

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 75-7379

ORIGINAL

In The  
**United States Court of Appeals**  
For The Second Circuit

SILVER CREATIONS, LTD.,

*Appellee.*

vs.

CLASSIC MASTERPIECES, a subsidiary of STONE FILMS  
INTERNATIONAL, INC.,

*Appellant.*

## JOINT APPENDIX



KOENIG, RATNER & MOTT  
*Attorneys for Appellant*  
60 East 42nd Street  
New York, New York 10017  
(212) 661-1103

ABRAHAM E. FREEDMAN  
*Attorney for Appellee*  
346 West 17th Street  
New York, New York 10011  
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## WITNESSES

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## DOCKET ENTRIES

JAI

CIVIL DOCKET  
UNITED STATES DISTRICT COURT

Jury demand date:

CH. 8041

Form No. 106 Rev.

## TITLE OF CASE

## ATTORNEYS

SILVER CREATIONS, LTD.

-v-

CLASSIC MASTERPIECES, a sub-  
sidiary of STONE FILMS  
INTERNATIONAL, INC.

For plaintiff:

Abraham E. Freedman  
346 West 17th St., N.Y.C. 929-8410

For defendant:

Koenig Ratner & Mott  
60 E. 42nd St. N.Y.C. 10017 661-1103

6/75

| STATISTICAL RECORD                                   | COSTS        | DATE | NAME OR RECEIPT NO. | REC. | DISB. |
|------------------------------------------------------|--------------|------|---------------------|------|-------|
| 5 mailed <input checked="" type="checkbox"/>         | Clerk        |      |                     |      |       |
| 6 mailed <input checked="" type="checkbox"/> 4-23-75 | Marshal      |      |                     |      |       |
| as of Action: Breach of contract.                    | Docket fee   |      |                     |      |       |
|                                                      | Witness fees |      |                     |      |       |
| ion arose at:                                        | Depositions  |      |                     |      |       |



# Docket Entries

JA2

SILVER CREATIONS, LTD. -v- CLASSIC MASTERPIECES, ETC.

74 CIV. 384

| DATE       | PROCEEDINGS                                                                                                                                                                                                                                                                                                                                                                                                           | Date Ord.<br>Judgment |
|------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------|
| Sept. 5-74 | Filed complaint & issued summons.                                                                                                                                                                                                                                                                                                                                                                                     |                       |
| Oct. 7-74  | Filed summons & return-served Classic Masterpieces 9-24-74.                                                                                                                                                                                                                                                                                                                                                           |                       |
| Oct. 29-74 | Filed ANSWER of deft. & COUNTERCLAIMS.                                                                                                                                                                                                                                                                                                                                                                                |                       |
| Nov. 14-74 | Filed plttf's REPLY to Counterclaims                                                                                                                                                                                                                                                                                                                                                                                  | KR&M<br>MEF           |
| Jan. 3-75  | Filed plttf's memorandum in support of motion for sanctions.                                                                                                                                                                                                                                                                                                                                                          |                       |
| Jan. 3-75  | Filed plttf's affdvt & notice of motion for sanctions.                                                                                                                                                                                                                                                                                                                                                                |                       |
| Jan. 8-75  | Filed memo endorsed on motion filed 1-3-75--Action assigned to Magistrate Raby for all pre-trial purposes. This motion is therefore assigned to him to hear and report. So Ordered--Owen, J. Mailed notices.                                                                                                                                                                                                          |                       |
| Feb. 3-75  | Filed Report of Magistrate Raby.                                                                                                                                                                                                                                                                                                                                                                                      |                       |
| Feb. 10-75 | Filed Report of Magistrate Raby.                                                                                                                                                                                                                                                                                                                                                                                      |                       |
| Mar. 7-75  | Filed affdvt of Tobias Stone in support of deft's application 28:144.                                                                                                                                                                                                                                                                                                                                                 |                       |
| Mar. 8-75  | Filed memo endorsed on affdvt filed 4-7-75--Motion to recuse is denied.--So Ordered Owen, J. Mailed notice.                                                                                                                                                                                                                                                                                                           |                       |
| Apr. 14-75 | Before Owen, J.--Non-Jury Trial Begun.                                                                                                                                                                                                                                                                                                                                                                                |                       |
| Apr. 15-75 | Trial Cont'd and concluded--Judge's Decision for plttf.                                                                                                                                                                                                                                                                                                                                                               |                       |
| Apr. 18-75 | Filed Pltffs. Pretrial Brief.                                                                                                                                                                                                                                                                                                                                                                                         |                       |
| Apr. 23-75 | Filed JUDGMENT #75,346--Plttf. recover of deft. the sum of \$61,300. plus interest. Plttf. retain \$13,000. previously paid by deft. The 1st & 2nd counterclaims of deft. are dismissed with prejudice. Upon satisfaction of this judgment, title to the remaining 36 Napoleonic Royal Coaches presently in possession of plttf. shall pass to deft.--Owen, J.--Judgment Entered-Clerk. ent. 4-28-75. Mailed notices. |                       |
| Apr. 28-75 | Filed Bill of Costs-No appearance in opposition. Bill of Costs as taxed in the sum of \$196.26, in favor of the plttf. and added to the Judgment #75,346-Clerk.                                                                                                                                                                                                                                                       |                       |
| May 14-75  | Filed deft's affdvt & notice of motion for a new trial-Ret. 5-16-75.                                                                                                                                                                                                                                                                                                                                                  |                       |
| May 13-75  | Filed plttf's memorandum in opposition to motion for a new trial.                                                                                                                                                                                                                                                                                                                                                     |                       |
| May 14-75  | Filed memo endorsed on motion filed 5-14-75--Motion denied. So Ordered--Owen, J. Mailed notices.                                                                                                                                                                                                                                                                                                                      |                       |
| Jun 25-75  | Filed Notice of Appeal by deft from judgment dated 4-23-75 to the U.S.C.A.P. of the U.S.D.C. Mailed Notice.                                                                                                                                                                                                                                                                                                           |                       |
| Jun 25-75  | Filed Undertaking for Costs on Appeal in the sum of \$250.00 Bond # 88 74 hhh Fidelity and Deposit Company of Maryland. H.V.                                                                                                                                                                                                                                                                                          |                       |
| 6/30/75    | Final Transcript dated Apr 18 1975                                                                                                                                                                                                                                                                                                                                                                                    |                       |
|            | RAYMOND H. HARRIS, Clerk                                                                                                                                                                                                                                                                                                                                                                                              |                       |
|            | <i>[Signature]</i>                                                                                                                                                                                                                                                                                                                                                                                                    |                       |
|            | Deputy Clerk                                                                                                                                                                                                                                                                                                                                                                                                          |                       |

COMPLAINT (Filed September 5, 1974)

JA3

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - x  
SILVER CREATIONS, LTD., :  
Plaintiff, : NOT A  
- against - : CLASS ACTION  
CLASSIC MASTERPIECES, a :  
subsidiary of STONE FILMS : COMPLAINT  
INTERNATIONAL, INC., :  
Defendant. : 74 Civil  
- - - - - x

. Plaintiff, Silver Creations, Ltd. by its attorneys  
Abraham E. Freedman, as and for its complaint against the defendant  
Classic Masterpieces, a subsidiary of Stone Films International,  
Inc. states as follows:

1. Plaintiff Silver Creations, Ltd. is a corporation  
organized and existing under and by virtue of the laws of the  
State of New Jersey.

2. On information and belief defendant Classic  
Masterpieces, a subsidiary of Stone Films International, Inc. is  
a corporation organized and existing under and by virtue of the  
laws of the State of New York.

3. The amount in controversy exclusive of interest and  
costs, exceeds the sum of Ten Thousand Dollars (\$10,000.00) and  
this Court has jurisdiction by reason of the diversity of citizen-  
ship of the plaintiff and the defendant.

4. On or about May 2, 1974 plaintiff and defendant  
entered into a contract whereby plaintiff agreed to furnish to  
defendant a limited edition of 200 Royal Napoleonic Coaches made  
of solid sterling silver and 24 carat gold over solid sterling  
silver, as more fully described in the written contract between  
the parties which is herein incorporated by reference. Defendant



### Complaint

JA4

agreed to pay for each Royal Napoleonic Coach the sum of \$1,800.00 with the Coaches to be ordered by defendant in increments of 50 units.

5. The contract between the parties provided that delivery of the first 50 Royal Napoleonic Coach would be made no later than 65 days from the signing of the agreement, at which time defendant would pay to plaintiff by certified check the sum of \$80,000.00.

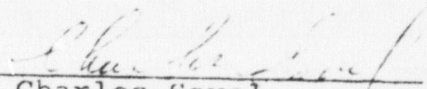
6. Within the time period required by the contract plaintiff duly tendered to defendant for its acceptance the first 50 Royal Napoleonic Coaches but defendant refused to accept delivery in accordance with the provisions of the contract and has refused to pay the amount due for said Coaches.

7. There is presently due and owing from defendant to plaintiff the sum of \$80,000.00 which amount has been demanded but defendant has refused to pay.

WHEREFORE, plaintiff demands judgment against defendant for damages in the amount of \$80,000.00, plus costs and attorneys fees incurred in bringing this action.

ABRAHAM E. FREEDMAN  
Attorney for Plaintiff

By

  
Charles Sovel

346 West 17th Street  
New York, N.Y. 10011



ANSWER (Filed October 29, 1974)  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JA5

-----X  
SILVER CREATIONS, LTD. : ASSIGNED TO JUDGE OWENS  
Plaintiff, : 74 CIVIL No. 3841  
- against - :  
CLASSIC MASTERPIECES, a : ANSWER  
subsidiary of STONE FILMS :  
INTERNATIONAL, INC. :  
Defendant. :  
-----X

Defendant, by its attorneys, KOENIG, RATNER AND MOTT,  
answering the Complaint of the Plaintiff, respectfully alleges as  
follows:

1. Denies information sufficient to form a belief  
as to the allegations contained in Paragraph 1 of the Complaint.
2. Admits the allegations contained in Paragraph 3,  
4 and 5 of the Complaint.
3. Denies each and every allegation contained in  
Paragraphs 2, 6 and 7 of the Complaint.

AS AND FOR A DEFENSE:

4. The Agreement , referred to in Paragraph 4 of  
Plaintiff's Complaint (hereinafter "Agreement") provided, in  
part, as follows:

13. Delivery of the fifty (50) Royal Napoleo-  
nic Coaches shall be made no later than  
sixty-five days from the signing of this  
Agreement.

The Agreement further provided:

12. A deposit of \$10,000 shall be paid to  
Silver Creations upon the signing of this  
Agreement, this deposit shall be imme-

Answer

JA6

diately returned if at the end of the sixty-five day period herein mentioned, the Coaches or any of the accompanying materials are not ready for delivery to Classic Masterpieces in perfect condition for acceptance.

5. The above-quoted provisions of the Agreement specified as time of the assence the delivery of the Coaches to Defendant within sixty-five (65) days from the time of the signing of the Agreement.

6. Plaintiff failed to comply with the Agreement in that Plaintiff failed to deliver the first Royal Napoleonic Coaches within the time provided for in the Agreement.

AS AND FOR A COUNTERCLAIM:

7. Plaintiff repeats and re-alleges each and every allegation contained in Paragraphs 1 through 6 of this Answer.

8. The Plaintiff further received Three Thousand (\$3,000) Dollars as a deposit from the Defendant.

9. Despite numerous demands, Plaintiff has refused to return the deposit of \$13,000 in accordance with the terms and conditions of Paragraph 12 of the Agreement.

10. Plaintiff's refusal to return the deposit has resulted in the damage to the Defendant in the amount of \$13,000.

AS AND FOR A SECOND COUNTERCLAIM:

11. Defendant repeats and re-alleges each and every allegation in Paragraphs 1 through 6 of this Answer.

12. Prior to May 2, 1974, Defendant advised the Plaintiff that Defendant had acquired numerous orders for the resale



of the Royal Napoleonic Coaches which were the subject matter of the Agreement and Defendant further advised Plaintiff that Defendant intended to resell them at a minimum price of \$5,000.

13. As a result of Plaintiff's failure to deliver said Royal Napoleonic Coaches within the time limit provided for in Paragraph 12 of the aforesaid Agreement, Defendant lost all the orders received for the resale of the said Royal Napoleonic Coaches.

14. As a result of the aforesaid failure of the Plaintiff to comply with Paragraph 12 of the Agreement and the resulting loss of orders, Defendant has been damaged in the amount of \$48,000.

WHEREFORE, Defendant prays for judgment:

- 1) Dismissing the Complaint herein together with the costs of disbursements of this action.
- 2) Granting to Defendant on the first on the first counterclaim damages in the amount of \$13,000.00.
- 3) Granting to the Defendant on the second counterclaim damages in the amount of \$48, 000.00.
- 4) Granting such other and further relief as may be just, proper and equitable.

DATED: New York, N.Y.  
October 28, 1974

KOENIG, RATNER AND MOTT  
Attorneys for the Defendant

By: Rapnael P. Koenig  
A Member of the Firm  
60 East 42nd Street  
New York, N.Y. 10017

TO: ABRAHAM E. FREEDMAN  
Attorney for the Plaintiff  
346 West 17th Street  
New York, N.Y. 10011

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

|                              |   |                              |
|------------------------------|---|------------------------------|
| -----x                       | : |                              |
| SILVER CREATIONS, LTD.,      | : |                              |
|                              | : |                              |
| Plaintiff,                   | : | 74 Civil 3841 (R.O.)         |
|                              | : |                              |
| - against -                  | : | <u>Reply to Counterclaim</u> |
|                              | : |                              |
| CLASSIC MASTERPIECES, a Sub- | : |                              |
| siduary of STONE FILM        | : |                              |
| INTERNATIONAL, INC.,         | : |                              |
|                              | : |                              |
| Defendant.                   | : |                              |
| -----x                       | : |                              |

Plaintiff, Silver Creations, Ltd., by its attorney, Abraham E. Freedman, in reply to defendant's counterclaim, states as follows:

First Counterclaim

1. Plaintiff denies each and every affirmative allegation set forth in Paragraphs 1 through 6 of defendant's Answer, except as to the allegations with respect to the provisions of the written contract between the parties, which allegations are denied as stated as said written contract speaks for itself.

2. It is admitted that plaintiff received Three Thousand Dollars (\$3,000.00) from defendant. It is denied that said amount was a deposit to be applied to the amount due on the coaches which are the subject of this action. Said Three Thousand Dollars (\$3,000.00) was in payment for brochures which were delivered and accepted by defendant.

3. Plaintiff denies each and every allegation of Paragraphs 9 and 10 of the First Counterclaim.

Second Counterclaim

4. Plaintiff denies each and every affirmative allegation set forth in Paragraphs 1 through 6 of defendant's



## Reply to Counterclaim

JA9

Answer, except as to the allegations with respect to the provisions of the written contract between the parties, which allegations are denied as stated as said written contract speaks for itself.

5. Plaintiff denies each and every allegation of Paragraphs 12, 13 and 14 of the Second Counterclaim, except as to the allegations with respect to lost orders for resale and damages resulting therefrom, as to which allegations plaintiff lacks knowledge sufficient to form a belief and therefore denies same and demands proof thereof, if relevant.

### Affirmative Defenses to Counterclaims

6. Defendant waived the requirement that delivery be within sixty-five days from the signing of the Agreement.

7. Time was not the essence of the Agreement between the parties.

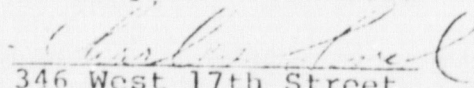
8. Recovery under both counterclaims is barred under the doctrine of estoppel by reason of defendant's own wrongful conduct in refusing to accept delivery of the coaches, refusing to respond to telephone calls, letters and telegrams from plaintiff, and in misleading plaintiff into continuing to perform the contract when defendant had no intention of performing its obligations under the contract.

WHEREFORE, plaintiff demands judgment dismissing the defendant's counterclaims, and that it recover its costs of defending against the counterclaims.

Dated: New York, N. Y.  
November 13, 1974

ABRAHAM E. FREEDMAN  
Attorney for Plaintiff

TO: Koenig, Ratner & Mott  
60 East 42nd Street  
New York, N. Y. 10017

By   
346 West 17th Street  
New York, New York 10011

LETTER DATED MARCH 17, 1975 FROM ABRAHAM E. FREEDMAN, ESQ. TO  
OWEN, J.  
ABRAHAM E. FREEDMAN

JAI 10

COUNSELLOR AT LAW AND PROCTOR IN ADMIRALTY

346 WEST 17TH STREET, NEW YORK, N. Y. 10011

CHARLES SOVEL  
STANLEY B. GRUBER  
HERBERT ZELENKO  
NEO R. PHILLIPS  
EDWARD M. KATZ  
MARTIN L. KATZ  
GEORGE J. CAPRIELLO, JR.

(212) 929-8410

37

PHILADELPHIA, PA. OFFICE  
FREEDMAN, BOROWSKY AND LORAY  
CHESTNUT STREET AT FIFTH  
PHILADELPHIA, PA. 19106  
LIT. 545-8400  
NEW JERSEY OFFICE  
600 VALLEY ROAD  
WAYNE, N. J. 07090  
LIT. 994-8400

March 17, 1975

Hon. Richard Owen  
United States District Judge  
Southern District of New York  
United States Courthouse  
Foley Square  
New York, N. Y. 10007

Re: Silver Creations Ltd. v. Classic  
Masterpieces, a Subsidiary of  
Stone Films International, Inc.  
74 Civil 3841 (RO)

Dear Judge Owen:

This office represents the plaintiff in the above captioned matter. The purpose of this letter is to request that your Honor list the case for trial in the immediate future, hopefully within the next three to four weeks. The circumstances giving rise to this request are as follows.

This is a commercial action, a suit on a contract where the amount of the plaintiff's claim is \$80,000. It arises out of a contract for the sale of 50 replicas of the Napoleonic coach which were manufactured in precious metal, - silver and gold over silver. The defendant rejected the plaintiff's tender of the coaches, claiming that the tender was not timely and that delivery within the time specified in the contract was "of the essence" of the contract. In response, plaintiff claims that the provisions with respect to delivery date were waived by the defendant. Thus the question involved is a relatively simple factual question as to which there will be two, or at most three witnesses, and, we believe, the case can be tried in less than one day.



Letter Dated March 17, 1975 From Abraham E. Freedman, Esq. to  
Owen, J.

JAIL

Hon. Richard Owen

- 2 -

March 17, 1975

The plaintiff, Silver Creations Ltd., is a small company. At the present time, it is in dire financial straits and its ability to pay its creditors and to remain in business depends, in large part, on whether or not it will be successful in this claim. If the trial of this action is delayed, there is a reasonable probability that Silver Creations will be forced into bankruptcy because of its inability to pay its creditors. Under these circumstances, justice delayed will be justice denied.

While I recognize that your Honor has a busy trial schedule, the plaintiff's need for a prompt trial in this case is particularly pressing. Accordingly, we respectfully request that your Honor schedule the case for trial as soon as possible.

Respectfully yours,

ABRAHAM E. FREEDMAN

By Charles Sovel  
Charles Sovel

cc: Paul Bennett Marrow, Esq.  
Koenig, Ratner & Mott

ENDORSED MEMORANDUM OF OWEN, D.J. (Filed April 8, 1975)

RO)

MEMORANDUM

JRT  
ORK

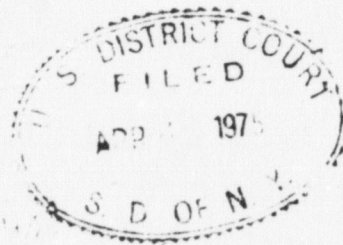
Treating this as a motion to  
recess, in my judgment it is  
frivolous and is hereby denied.

SO ORDERED

4/7/75

James Owen  
U.S.D.J.

INC.



mitted



TRANSCRIPT OF PROCEEDINGS BEFORE OWEN, D.J. ON APRIL 14 & 15,  
19751 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK3 -----X  
4 SILVER CREATIONS, LTD., :

5 Plaintiff, :

6 vs. :

7 CLASSIC MASTERPIECES, etc. :

8 Defendants :  
9 -----X

: Before:

: HON. RICHARD OWEN,  
: DISTRICT Judge.

: 74 Civ. 3841

10 New York, April 14, 15, 197511  
12  
13  
14  
15 STENOGRAPHER'S MINUTES  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1 elesb

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 - - - - - x

5 SILVER CREATIONS, LTD., :

6 Plaintiff, :

7 v. :

74 Civ. 3841

8 CLASSIC MASTERPIECES, etc., :

9 Defendants. :

10 - - - - - x

12 Before:

13 HON. RICHARD OWEN,

14 District Judge.

15 April 14, 1975  
16 10:00 a.m.

17 APPEARANCES:

18 ABRAHAM E. FREEDMAN, Esq.  
Attorney for Plaintiff

19 BY: NED R. PHILLIPS, Esq., of Counsel.

21 KOENIG, RATNER & MOTT, Esqs.  
Attorneys for defendants

22 BY: RAPHAEL P. KOENIG, Esq.  
23 PAUL MARROW, Esq., of Counsel.



1 elesb

2

2 (Case called.)

3 MR. KOENIG: If your Honor please, the defendant  
4 is not ready, and I should like to make an application to  
5 adjourn this case. I want to submit certain information  
6 for the record.

7 I am not going to re-argue the motion which your  
8 Honor has decided, which was evidently decided on April 7,  
9 1975 and filed on April 8, 1975 in the District Court.  
10 There was indication given to the defendants by postal card  
11 which was received, I believe, on April 10, 1975.

12 Prior to the making of the motion, a conversation  
13 was had between Mr. Marrow and your law assistant, and as a  
14 result of that conversation, a letter was written to your  
15 Honor dated March 31, 1975, in which Mr. Marrow stated what  
16 he had been informed by a Mr. Saddler, whom I assume is  
17 your law assistant.

18 THE COURT: Sudler. Yes, go ahead.

19 MR. KOENIG: Pursuant to the language in the  
20 letter, a copy of which your Honor received and a copy sent  
21 to the other side -- I would like to introduce that in  
22 evidence as an exhibit.

23 (Defendants' Exhibit A marked for  
24 identification.)

25 THE COURT: This is on an application that is

xxx

1 elesb

2 going to be made.

3 MR. KOENIG: Mr. Marrow was of the opinion after  
4 conversation that your Honor would not decide the motion  
5 until today, and that at that time a request would be made  
6 before your Honor for an adjournment of the case in the  
7 event it was not reassigned. I assume that the papers on  
8 the motion are part of the record of this Court.

9 THE COURT: They are.

10 MR. KOENIG: Unfortunately, on that assumption,  
11 communication was had with the defendants, the officers of  
12 the defendant corporation that such would occur.

13 The main witness for the defendant, Mrs. Stone, is  
14 presently in Colorado in a rather inaccessible portion of  
15 the State. Upon receiving information from your law  
16 assistant that the case would positively be tried today,  
17 Mr. Marrow called up the telephone number of the Stones, at  
18 which there was no answer, and wrote to the Stones telling  
19 them that the case would be on today so that they would be  
20 notified.

21 He informs me that Mr. Stone will not return  
22 until tomorrow and then it will be necessary to call up  
23 Colorado for Mrs. Stone to testify.

24 THE COURT: Do you have a number in Colorado right  
25 this minute?



1 elesb

4

2 MR. MARROW: No, your Honor. We attempted to  
3 reach her. She operates a silver mine in Colorado and,  
4 apparently, the silver mine has no telephone. This is one  
5 of the problems we had in the past to get depositions. It  
6 is a rather complex unfortunate situation.

7 THE COURT: Aside from one or the other of the  
8 Stones, who is available here today?

9 MR. KOENIG: Neither. Mr. Stone will be in  
10 tomorrow. But according to the testimony, his  
11 participation in the occurrence was minor. The entire  
12 negotiation was conducted with her, and she has testified  
13 at length in the deposition.

14 THE COURT: Mr. Koenig, what is your application?

15 MR. KOENIG: My application is to adjourn this  
16 case until Thursday, at which time we will have the Stones  
17 present.

18 Unfortunately, as far as my calendar is concerned,  
19 I have to start a trial before Judge Charles Brieant next  
20 Monday, which will take three weeks. It is an SEC case and  
21 this is my free week which I had hoped to use to prepare  
22 for that trial.

23 THE COURT: I tell you what we will do. I will  
24 start the case today and we will take everybody but Mrs.  
25 Stone, and Mrs. Stone will come in Wednesday or Thursday.

1 elesb

5

2 She can't be more than an hour or two of testimony from  
3 what I gather. When she arrives, we will take her.

4 MR. PHILLIPS: Your Honor, I oppose this  
5 application.

6 THE COURT: Well, she isn't here.

7 MR. PHILLIPS: The problem is, your Honor, that  
8 Mr. Freedman, the president of the plaintiff corporation  
9 is leaving for Europe on Wednesday. This case was  
10 scheduled.

11 It seems to me it is an imposition on the Court  
12 to say that we anticipated that we would not go to trial  
13 because we were making a motion for the Court to  
14 disqualify itself when a firm trial date had been set.

15 I don't say at this point that I will absolutely  
16 have to have the president of the corporation but there  
17 may be matters brought out on cross-examination of the  
18 defendant which may require Mr. Freedman's testimony, and  
19 I can't anticipate at this time what it will be.

20 We have a firm trial date. Our people are here.  
21 I would point out to your Honor that we have had to make  
22 motions in order to obtain depositions, that this has been  
23 a constant delaying on the part of the defendants here and  
24 repeatedly.

25 There were two appointments, for example, by Mr.



1 elesb

6 .

2 Marrow to come to our office to examine documents. He  
3 never showed up. This morning in court he asked me if I  
4 had brought the documents which he had neither subpoenaed  
5 nor requested that I produce.

6 I submit, your Honor, that this is nothing more  
7 than an attempt at delay. There are depositions taken of  
8 both defendants. And I think the Court of Appeals has held  
9 that in such situations where a firm trial date has been  
10 set by the Court and where depositions have been taken, the  
11 reasons such as these given for delay are frivolous and  
12 should not be countenanced.

13 THE COURT: Mr. Koenig, let me say this: Mr.  
14 Sudler tells me that he was in conversation with you to  
15 the effect that if this motion went against you that we  
16 would go forward on the scheduled trial date. He tells  
17 me that and this was my instruction, frankly, to him.

18 Also --

19 MR. KOENIG: That is not the fact, however.

20 THE COURT: Just a minute, sir. You called my  
21 chambers, I think on Thursday of last week, did you not,  
22 and spoke to Mr. Sudler about desiring an adjournment  
23 because you were going to be preparing for trial in a case  
24 that was on a week later; isn't that true?

25 MR. KOENIG: What happened was, Mr. Marrow called

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2 Mr. Sudler and I was put on the telephone and I explained  
3 my situation to him. I did not participate in the  
4 conversation between him and Mr. Marrow.

5 THE COURT: The upshot of what I am getting at  
6 is that the statement that was made to me was that you  
7 wanted an adjournment and the only reason it was given was  
8 your trial.

9 MR. KOENIG: By me, but not by Mr. Marrow.

10 THE COURT: No statement was given to me that  
11 any client of yours was going to be unavailable.

12 MR. KOENIG: It was in the letter.

13 THE COURT: I know. But this is now on  
14 Thursday April --

15 MR. KOENIG: If your Honor please, Mr. Marrow is  
16 here to repeat the conversation he had with Mr. Sudler.

17 THE COURT: -- Thursday, April 10th, and the  
18 letter is the 31st, so, of course, when you talked about  
19 something on April 10th, that supersedes any letter that  
20 you sent me well over a week earlier. Nothing was said  
21 last Thursday about any unavailability of any client.

22 MR. KOENIG: May Mr. Marrow tell your Honor  
23 exactly what happened in this conversation? I did not  
24 participate in that conversation.

25 THE COURT: I know. Mr. Sudler reported to me



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that your desire was for an adjournment, that you had another case that you wanted to use this time to prepare for.

MR. KOENIG: That is not so.

(Pause.)

THE COURT: Mr. Marrow, apparently Mr. Sudler says you did mention to him the witness --

MR. MARROW: Yes. I did, your Honor.

THE COURT: But he also tells me that he had unequivocally stated to you that if this motion were denied, this was a firm trial date.

MR. MARROW: Your Honor, I think I can straighten this out, because Mr. Sudler is right; but you have to put it in its proper perspective to find out where the confusion resulted.

When I first spoke to Mr. Sudler, which was prior to the time I sent in the papers, he said to me at that time, "Understand that this will be a firm trial date." When I wrote the letter, it occurred to me that to make this come through protocol only to face a re-assignment would be unfair. I did expect and had no reason to believe otherwise that the 14th was going to be the date on which we were going to receive a decision on that motion. The first I learned otherwise was I think last Thursday, when I spoke to Mr. Sudler. At that time we had received a card in the mail and immediately

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sent someone down to court to find out what the result was. But as of last Thursday, or at least up until Thursday morning, we had no reason to believe that the application for adjournment would not be considered, because we had not heard anything from your chambers.

Under the circumstances, our clients, both of them, asked us, what do we do? I said, "Well, it just seems to me Mr. Stone had advised that he had to be in some other place." I don't even know where he is. I have attempted to reach him. I attempted to reach him, I believe, last Thursday.

In fact, in my letter, which I have here, I told him should he receive it he could reach me at home and gave him my home phone and Mr. Koenig's home phone number. Neither of us heard from him. So I think that puts it perhaps into perspective.

THE COURT: Except I am also troubled by this fact: if you knew that today is a firm trial date, your clients had a duty to keep in touch with you, and they just can't be disappearing into silver mines, smiling at the United States District Court by reason of unavailability.

I am going to deny the application.

MR. KOENIG: If I may be heard briefly --

THE COURT: I suggest that while one of us is in court at this point, the other one be arranging to get these



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people here, if you want them. I will consider taking them tomorrow. I think, counsel, you would have no objection to that.

MR. PHILLIPS: No objection, your Honor.

MR. KOENIG: I don't think we can get in touch with them today, your Honor. There is no way of getting in touch with them today.

THE COURT: I would assume that the United States telegraph, a messenger on donkeyback, if necessary, can get to Mrs. Stone. I find it incredible for a lawyer to say to me that starting with last Thursday that you cannot find a woman who is located in Colorado.

MR. KOENIG: We made every effort that we could.

THE COURT: Then we will go forward and we will try the case. If there is a deposition here -- We are going to start this morning. I suggest that the necessary efforts be made. If you want this woman here, I will give you until tomorrow. But, Mr. Koenig, we can't try a case this way and come in and say, "I can't find my client," after five days of trying, when she knew that today was the day for trial, and until something happens, she has a duty to keep in touch with her lawyer, and if she wasn't aware of that duty, you had a duty to make her aware that she should keep in touch with you.

ELP

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MR. KOENIG: Of course, your Honor, when she spoke to mr originally, I explained to the Stones that under the usual procedure in the Federal Court, this case would not be heard for many, many months; and it was your Honor's decision placing it on today which anticipated a case which might normally be tried until next October.

THE COURT: That is not quite so, either, because I offered to try this case on Good Friday, the day before Easter, to much anguish in various quarters. That was a fact that everyone was aware of.

MR. KOENIG: I understand. I am not disputing your Honor's intention to try the case. I am merely pointing out what the usual procedure is in this building and has been for ever since I have known it, which goes back a great many years.

THE COURT: Be that as it may, I feel, against the background of what happened here, the case will proceed, and someone from your office had better just see about locating your clients.

MR. KOENIG: I just want to point out that in the absence of the officers of the defendant corporation I don't know how I can proceed.

THE COURT: I would assume that you are prepared to try the case and cross-examine the witnesses for the plaintiff, and I assume you have read the depositions of your clients, so



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2 you know what their position is.

3 MR. KOENIG: Obviously, I spent all week end doing  
4 that; but there might be things that will develop during the  
5 course of the testimony which will require consultation with  
6 the clients, and that is my problem.

7 THE COURT: That objection I fear I must overrule.

8 MR. KOENIG: As far as tomorrow is concerned, your  
9 Honor, I don't see how it is possible to get this woman back  
10 from Colorado by tomorrow morning.

11 THE COURT: You may be able to do it by tomorrow  
12 afternoon. Let's go forward.

13 MR. KOENIG: I don't know how we can do it.

14 THE COURT: We are going forward, sir.

15 MR. KOENIG: Your Honor, preliminarily, Mr. Marrow,  
16 who is a member of the Bar of the State of New York, is not  
17 a member of the Bar of this Court. May he be admitted for the  
18 purposes of this case?

19 THE COURT: I am pleased to have him.

20 MR. MARROW: Thank you, your Honor.

21 THE COURT: Very good. Mr. Phillips, do you want  
22 to start?

23 MR. PHILLIPS: I call as a witness for the plaintiff  
24 Mr. Richard Moskow.

1 ELP

2 R I C H A R D M O S K O W , called as a witness by the  
3 plaintiff, being first duly sworn, testified as follows;

4 DIRECT EXAMINATION

5 BY MR. PHILLIPS:

6 Q Would you state your name?

7 A Richard Moskow.

8 Q Where do you live?

9 A 20 Petrie Lane, Wayne, New Jersey.

10 Q By whom are you employed?

11 A Silver Creations, Ltd.

12 Q Where is that company located?

13 A At 428 Old Hook Road, Emerson, New Jersey.

14 Q What is your position with that company?

15 A I am a vice president of the company.

16 Q How long have you been a vice president of the com-  
17 pany?

18 A About four and a half years.

19 Q What are your duties as vice president of Silver  
20 Creations, Ltd.?

21 A I am in control of all receiving, shipping. Part  
22 of my duties are partial buying and partial sales.

23 Q In connection with your duties with the corporation,  
24 do you have anything to do with negotiations of contracts?

25 A Yes.



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14

2 Q Did Silver Creations enter into a contract with the  
3 defendant, Classic Masterpieces, on or about May 2, 1974?

4 A Yes; we did.

5 MR. PHILLIPS: May we have this marked for identifi-  
6 cation.

7 (Plaintiff's Exhibit 1 marked for identification.)

8 Q Mr. Moskow, I show you Plaintiff's Exhibit 1 for  
9 identification and ask you if you can tell us what that  
10 document is.

11 A This is the contract that was signed May 2nd, be-  
12 tween Classic Masterpieces and Silver Creations.

13 THE COURT: Do you offer it in evidence?

14 MR. PHILLIPS: It will be.

15 MR. KOENIG: If that is the contract, I have no  
16 objection.

17 THE COURT: It may be received.

18 (Plaintiff's Exhibit 1 for identification was re-  
19 ceived in evidence.)

20 Q Can you tell us briefly: just summarize what this  
21 is a contract for.

22 A Silver Creations was to produce fifty Royal Napoleon-  
23 Coaches for Classic Masterpieces.

24 Q What was the total of the contract?

25 A The total edition was two hundred. The first fifty

1 ELP Moskow - direct

15

2 were to be created at this time.

3 Q What is a Napoleonic Coach?

4 A Silver Creations, for the fiftieth anniversary of  
5 General Motors, created, using the Fisher Body logo --

6 Q What is a logo?

7 A The logo of Fisher Body, of General Motors.

8 Q What is meant by the word "logo"?

9 A Their corporate identification. An edition of a  
10 thousand pieces for General Motors. From this edition, we  
11 took two hundred of the edition and made minor modifications  
12 on the coaches. It is a coach made out of silver and gold  
13 over silver, weighing approximately seven, seven and a half  
14 pounds, and it was part of the -- from the Napoleonic era,  
15 part of his royal wedding coach and coronation coach.

16 Q Pursuant to that Paragraph 12 of the contract, did  
17 the corporation, that is, the plaintiff corporation, receive  
18 a \$10,000 deposit?

19 A Yes; we did.

20 Q Pursuant to Paragraph 17 of that contract, did the  
21 corporation lend to the defendants a Fisher Body Coach for  
22 use as an exemplar or demonstration?

23 A Yes; we did.

24 Q Did there come a time when that coach that you loaned  
25 to the defendant was returned?



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2 A Yes; there was.

3 Q When that was returned, was an exchange made of  
4 another coach?

5 A Yes; there was.

6 Q Did that other coach have the modifications called  
7 for by the contract?

8 A It had the first prototypes of the modifications;  
9 yes.

10 Q I direct your attention to page 8 of Exhibit 1. At  
11 the bottom paragraph there is an addendum regarding brochures.  
12 Did you prepare brochures in accordance with that section of  
13 the contract?

14 A Yes; we did.

15 Q Did you deliver those brochures to the defendant?

16 A Yes; we did.

17 Q Did you receive the \$3,000 provided for in that  
18 contract?

19 A Yes; we did.

20 MR. PHILLIPS: May we have this marked for identifi-  
21 cation as Plaintiff's Exhibit 2.

22 (Plaintiff's Exhibit 2 marked for identification.)

23 MR. KOENIG: No objection.

24 BY THE COURT:

25 Q Mr. Moskow, when did you get the prototype coach

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back that you say was returned?

MR. PHILLIPS: That is the Fisher, the first one.

Q (Continuing) The Fisher Coach.

A I exchanged it with the modifications on it.

Q When did you do that?

A I would say the first week in June.

THE COURT: All right.

BY MR. PHILLIPS: (Continuing)

Q I show you Plaintiff's Exhibit 2. Is that the brochure that you prepared and delivered to the defendants?

A Yes; it is.

Q When were those three thousand brochures delivered to the defendant?

A The latter part of February.

Q What year?

A 1974.

Q In other words, before the execution of the contract, which is Exhibit 1; is that correct?

A Yes.

Q Did the plaintiff corporation then proceed to take the necessary steps to fill this order for the first five Napoleonic Coaches?

A Yes.

MR. PHILLIPS: Incidentally, does the Court wish to



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2 see the brochure that we are talking about?

3 (Pause).

4 Q Where were these coaches manufactured?

5 A In Tokyo.

6 Q Was an order placed for these fifty coaches?

7 A There was; yes.

8 Q Was this paid for?

9 A Yes; it was.

10 MR. PHILLIPS: May we have these marked as  
11 Plaintiff's Exhibits 3 and 4.

12 THE COURT: Who did this?

13 THE WITNESS: A firm by the name of GTO Lithographers.  
14 We gave them all the art work.

15 THE COURT: They caused Classic Masterpieces to be  
16 put in here at the --

17 THE WITNESS: Yes.

18 THE COURT: Did anybody from Classic Masterpieces  
19 go over this with you before it went into final form?

20 THE WITNESS: Yes. Mr. and Mrs. Stone. It was  
21 their copy.

22 THE COURT: When did this go to the printers for  
23 printing?

24 THE WITNESS: I would say the beginning of February.

25 THE COURT: Of 1974?

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2 THE WITNESS: Yes, sir.

3 (Plaintiff's Exhibits 3 and 4 marked for identifica-  
4 tion.)

5 Q I show you Plaintiff's Exhibit 3 for identification  
6 and ask if you can tell us what this is.

7 A This is the invoice from Marunouchi, Tokyo, Japan,  
8 for the coaches and the modifications for the coaches.

9 Q I show you Plaintiff's Exhibit 4 for identification.  
10 Can you tell us what that is?

11 A This is the payment for this invoice, in full ad-  
12 vance.

13 Q What is the amount?

14 A \$46,500.

15 MR. PHILLIPS: I offer Plaintiff's Exhibits 3 and 4  
16 into evidence.

17 MR. KOENIG: I am going to object to these two  
18 exhibits, your Honor, on the ground that they are not relevant  
19 to this case, as to whether or not they did pay --

20 THE COURT: Tell us the purpose of these exhibits,  
21 Mr. Phillips.

22 MR. PHILLIPS: Simply to show that the plaintiff  
23 performed on his part. These have been identified as the  
24 payment for the coaches to the manufacturer.

25 THE COURT: Let me see them, please.



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2 (Pause.)

3 THE COURT: Yes. Overruled.

4 (Plaintiff's Exhibits 3 and 4 for identification  
5 were received in evidence.)

6 Q When did you have all of the parts necessary for the  
7 assembly of the fifty Napoleonic Coaches at your place in  
8 New Jersey?

9 A You mean the last parts completed? Because I had  
10 some much earlier. I had the last parts by July 3rd.

11 MR. PHILLIPS: Can we stipulate, counsel, that under  
12 Paragraph 12 of the contract, delivery of the first fifty  
13 were to take place on July 6th; that is, the 65th day from  
14 the jacket. We have July 6th.

15 MR. KOENIG: Yes.

16 Q On July 6th, were any of these Napoleonic Coaches  
17 ready for delivery and inspection?

18 A Yes; there were.

19 Q Did you in a --

20 MR. KOENIG: I object to the question, your Honor.  
21 It is a double question: delivery and inspection.

22 MR. PHILLIPS: I will rephrase the question, your  
23 Honor.

24 Q Did you have any coaches ready for inspection on  
25 July 6th?

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21

2 A Yes; we did.

3 Q The contract provides that the inspection shall be  
4 made at a time convenient to both parties at the premises in  
5 New Jersey. Did you make any attempt to contact the defendant  
6 for the purposes of making any inspections?

7 A Yes; I did.

8 Q When was that?

9 A On July 3rd. It was my first call.

10 Q Whom did you speak to?

11 A Mrs. Stone.

12 Q What did you say to her and what did she say to you  
13 at that time?

14 MR. KOENIG: I object, unless there is some identifi-  
15 cation of the person with whom he spoke.

16 THE COURT: He said Mrs. Stone.

17 MR. KOENIG: As to whether or not he can identify  
18 her voice.

19 THE COURT: On that ground, I will sustain it.

20 Can you lay a foundation?

21 MR. PHILLIPS: Yes, your Honor.

22 Q Did you at any time meet the officers of the defendant  
23 in this case?

24 A Yes; I did.

25 Q Would you tell us the names of the persons whom you



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22

2 met and their titles, if you know?

3 A Jan Stone and Toby Stone; husband and wife.

4 Q Did they tell you that they were officers of Classic  
5 Masterpieces?

6 A Yes.

7 Q Did they give you a telephone number where you  
8 could call them for the purposes of transacting any business?

9 A Yes.

10 Q Did you, on July 3rd, call that telephone number?

11 A Yes.

12 Q Did you ask for Mrs. Janice, Jan Stone?

13 A She picked up the phone. I knew her voice.

14 Q And you had spoken to her on prior occasions on the  
15 phone --

16 THE COURT: The objection is overruled. You knew  
17 her voice as being Mrs. Stones?

18 THE WITNESS: Yes.

19 THE COURT: Did you talk to her before?

20 THE WITNESS: Many times.

21 Q What did you say to her on July 3rd, and what did  
22 she say to you?

23 A I told her the coaches have just arrived; I have  
24 one toget' ; I have all the other components and parts,  
25 that she could come in and take a look when it is convenient

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23

to her.

Q     Was a date set for inspection?

A     No.

Q     What did she say to you at that time?

A     Just that she wants to see them all, and she was getting prepared to go away.

Q     On July 6th, were the fifth coaches completely assembled?

A     No.

Q     How many were assembled on July 6th?

A     Well, July 6th was a Saturday. On July 5th we had sixteen of them ready. One the first day and fifteen the second day.

Q     Did you receive any communication, oral or written, from any person representing the defendant in this case on July 6th?

A     No.

Q     When were the remaining thirty-four coaches assembled?

A     On Monday --

Q     Or thirty-three, whatever the number.

A     Thirty-four. On Monday.

Q     What would be the date?

A     July 8th.



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24

Q Did you hear anything from the Stones on July 8th regarding this matter?

A No.

Q Did you receive any writings from the Stones on July 8th regarding this matter?

A No.

Q When was the next time that you attempted to communicate with the Stones?

A I tried on July 8th, 9th, 10th. The 8th, there was no answer. On the 9th, I think I got the maid, and on the 10th I got Jan, and I said, "When are you coming in? They are ready for your inspection." She said she was going away on a trip, or she wasn't going to be around.

On the 11th, I got the maid again, and then I kept getting no answer after that.

Q On any of these days, did anybody representing the defendant corporation indicate to you that they were canceling this contract?

MR. KOENIG: I object to the form of the question, your Honor.

THE COURT: It is a bit leading, but was anything said on the subject of cancelation between you at any time, on the 8th, 9th or 10th?

THE WITNESS: No.

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2 Q Was any demand made during this period of time for  
3 the return of the \$10,000 deposit?

4 A No; not at all.

5 MR. PHILLIPS: May we have this marked as Plaintiff's  
6 Exhibit 5 for identification.

7 (Plaintiff's Exhibit 5 marked for identification.)

8 Q I show you Plaintiff's Exhibit 5 for identification  
9 and ask if you can tell us what that is.

10 A These are part of our phone bills.

11 Q I direct your attention to the particular items  
12 circled in red. Can you tell us what those items represent?

13 A These are the phone calls that were made to the  
14 Stones' house, the ones that are circled.

15 Q What is the telephone number that you were given by  
16 the Stones for use for business purposes?

17 A 212-628-2680.

18 MR. PHILLIPS: I offer Plaintiff's Exhibit 5 in  
19 evidence, limited to the four items circled, namely, the  
20 telephone calls made to the number mentioned for the dates  
21 July 3rd, July 9th, July 10th and July 11th.

22 THE COURT: Mr. Moskow, according to you, Mrs.  
23 Stone said she was going to be away on a trip and wasn't going  
24 to be around. How did you leave that conversation?

25 THE WITNESS: Well, she said she will take care of it



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when she gets back. It was acceptable.

THE COURT: When did she say she was coming back?

THE WITNESS: She didn't have an exact date, but I was going away more or less at the same time, so I didn't have a conflict there.

MR. KOENIG: Your Honor, I don't object on the basis of the fact that the telephone company, if they were called, would verify that these are the telephone company slips, and I don't object to the fact that various telephone calls were made, but I do object on the ground that that is not evidentiary, that there is no indication with whom the conversations were had on those particular dates.

THE COURT: I don't think it is being offered for more than that. I think it is only being offered to corroborate Mr. Moskow's testimony that he placed the calls.

MR. PHILLIPS: Precisely, your Honor.

THE COURT: On those grounds, I will receive them.

MR. KOENIG: I object on the ground it is not corroborated.

THE COURT: That objection I overrule.

(Plaintiff's Exhibit 5 for identification was received in evidence.)

Q Were there any further attempts at phone communications between the corporation and the defendant between July 11

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and August 29th?

A Yes.

Q Tell us what those attempts were and what happened.

A I would say when I got back from my trip, which was the end of July, I started a routine of calling them every -- trying to get in touch with them every day, because I wanted them to --

MR. KOWNIG: I object to his reasoning, your Honor.

THE COURT: Sustained.

A (Continuing) I tried every day.

Q Were you successful in contacting either of the Stones during this period?

A I believe I spoke to Mr. Stone once during that period. Other than that, the maid.

Q What did you say to Mr. Stone and what did he say to you?

MR. KOENIG: I object on the ground he says he believes. That is no proof.

MR. PHILLIPS: I withdraw the question.

Q Did you recognize the voice as being that of Mr. Stone?

A I spoke to him once.

Q Had you previously had conversations with him on the telephone before that date, on which you spoke to him?



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A     Yes.

Q     Did you recognize his voice?

A     Yes; I did.

Q     What did you say to him on that occasion and what  
did he say to you?

A     Just that, "I'd like you to pick up your coaches,  
inspect the coaches and clear up the contract."

Q     What was his reply?

A     "Jan will take care of it."

Q     Jan, being his wife?

A     Jan, being his wife.

THE COURT:    When was this call, approximately?

THE WITNESS:   In August.

THE COURT:    You say you tried to call in August?

THE WITNESS:   Almost every day.

MR. PHILLIPS:   May I have this marked for identifica-  
tion.

(Plaintiff's Exhibit 6 marked for identification.)

Q     Between July 11th and August 29th, did you receive  
any written communications from the defendant on the subject  
of cancelation of the contract?

A     No; I did not.

Q     Did you receive any oral notice from defendants on  
the subject of cancelation?

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A No; I think not.

Q Did you receive any written demand for return of the \$10,000 deposit?

A No; I did not.

Q During that time period, did you receive any oral demand for return of the \$10,000 deposit?

A No; I did not.

Q Did you then, on August 29th, send a communication to the defendants?

A Yes; I did.

Q I show you Plaintiff's Exhibit 6 for identification and ask you if you have seen that before.

A Yes. This is a copy of the telegram.

Q What was the date that that was sent?

A August 29th.

MR. PHILLIPS: I offer this Mailgram into evidence.

MR. KOENIG: There is no proof of receipt, your Honor. I object on that ground.

MR. PHILLIPS: I submit that all he testified is that this was sent.

THE COURT: Was a deposition of anybody taken? Was the receipt of this acknowledged in any deposition?

MR. PHILLIPS: I am reviewing the deposition now. I don't believe that that was specifically raised.



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THE WITNESS: I believe in Mr. Stone's.

THE COURT: Mr. Koenig, if the deposition acknowledges this was received, then you should obviously have no objection.

MR. KOWNIG: Mr. Marrow conducted the deposition. I am not familiar with whether that was testified to.

MR. MARROW: I don't believe that that question was raised at the time of the deposition. I will check, your Honor.

(Pause.)

MR. PHILLIPS: Yes, your Honor. May I have the document, your Honor?

(Pause.)

MR. MARROW: On what page?

MR. PHILLIPS: I call your Honor's attention to the fact that --

THE COURT: Call it to Mr. Marrow's attention. Then he may stipulate it into evidence.

MR. PHILLIPS: Page 51 of Mr. Stone's deposition, lines 10 to 19, referring to Defendant's Exhibit 9.

MR. MARROW: That would be correct, your Honor. It was referred to on page 51 of the deposition.

THE COURT: Very good. I take it that deposition shows it was received.

MR. KOWNIG: I withdraw the objection, then, your Honor.

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MR. PHILLIPS: I offer the exhibit.

THE COURT: It is received.

(Plaintiff's Exhibit 6 for identification was received in evidence.)

MR. PHILLIPS: Has the Court read it?

THE COURT: I did.

Q This lawsuit was started on September 5th. Did you receive any response to this Mailgram, which was sent on August 29th, between August 29th and September 5th, when this lawsuit was started?

A No.

Q After this lawsuit was started, did you have any conversations with either of the defendants?

A Yes; I did.

MR. KOENIG: Objected to, your Honor.

MR. PHILLIPS: May I withdraw that question and rephrase it?

Q - with anyone on behalf of the defendant?

MR. KOENIG: I object to any conversation subsequent to the lawsuit.

THE COURT: Let's see what it is.

Overruled. At this point it calls for a yes-or-no.

A Yes.

THE COURT: Whom did you talk to?



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2 THE WITNESS: Mrs. Stone and Mr. Stone.

3 Q Would you tell us what your conversation with Mrs.  
4 Stone consisted of, what you said to her and what she said to  
5 you?

6 MR. KOENIG: That is objected to, your Honor.

7 THE COURT: On what ground?

8 MR. KOENIG: It is subsequent to the lawsuit. He said  
9 it was started on September 5, 1974, and he is now asked about  
10 conversations subsequent to the institution of the lawsuit.

11 THE COURT: Isn't a party competent to make an ad-  
12 mission against interest, even if a lawsuit had started? I  
13 would assume so.

14 MR. KOENIG: I don't know what the conversation is,  
15 your Honor.

16 THE COURT: I don't, either. We will take it out  
17 if it is inapplicable.

18 Go ahead.

19 Q What did you say to her and what did she say to you  
20 in this conversation?

21 A First, it was Mr. Stone, and Mr. Stone gave me a number  
22 in Colorado where to call.

23 Q A telephone number in Colorado?

24 A Yes.

25 Q Did he tell you his wife was at the mine?

1 ELP Moskow - direct

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2 MR. KOENIG: That is objected to, your Honor, as a  
3 leading question.

4 MR. PHILLIPS: Withdrawn.

5 Q Did he tell you what she was doing in Colorado?

6 A At the mine.

7 Q Did you make that telephone call to Mrs. Stone?

8 A I did.

9 Q Did you reach her?

10 A I did.

11 Q In Colorado?

12 A Yes.

13 Q Tell us what you said to her and what she said to  
14 you.

15 A I told her I would like to deliver the coaches, and  
16 I would like to get paid for the contract. That's why the  
17 lawsuit was started, because he had spoken to -- Mr. Stone had  
18 spoken to Mrs. Stone --

19 Q Don't say anything about what somebody else said.

20 THE COURT: Let's get this conversation down.

21 You say, also, Mr. Stone gave you a telephone number  
22 of the mine in Colorado?

23 THE WITNESS: It's an area about forty miles or  
24 fifty miles away from the mine, where they have two-way com-  
25 munication to reach the mine, so if a call is made or you know



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ELP                      Moskow - direct

34

when the person is going to be there, you can reach them.

THE COURT: That is what Mr. Stone told you?

THE WITNESS: Yes.

THE COURT: All right.

Q     You were continuing your conversation.

MR. PHILLIPS: May we have the last portion read  
back so he can pick up the thread.

(Record read.)

A     She said to make a delivery of five coaches at  
this time to Mr. Stone, and when she gets back she will take  
care of the rest.

Q     Was such a delivery made?

A     No.

Q     Was any payment made beyond the \$10,000?

A     No. There was more to the conversation.

Q     Go ahead.

A     I said to Mrs. Stone the second time I called her,  
because I went to the president of the company to ask him,  
would it be all right to make such a delivery --

MR. KOENIG: I object to it, the conversation with  
the president of the company.

THE COURT: You spoke with the president of the  
company, and you then called, after speaking to him, you then  
called Mrs. Stone back?

1 ELP Moskow - direct

35

2 THE WITNESS: Yes.

3 THE COURT: What did you say to her and she to you  
4 at that time?

5 THE WITNESS: That we would deliver ten coaches, and  
6 if she would pay us for those ten coaches and leave the  
7 \$10,000 on deposit on the balance of forty coaches, we would  
8 make the delivery.

9 Q Was this transaction consummated in this manner?

10 A No; it was not.

11 Q Were any coaches ever delivered to the Stones?

12 A Aside from the sample, no.

13 Q Did you ever get that sample back?

14 A No. She has that sample.

15 MR. KOENIG: I object to this line of testimony,  
16 your Honor, as irrelevant.

17 THE COURT: Overruled.

18 Q Did you make any attempts to dispose of the coaches  
19 after this lawsuit started?

20 A Yes.

21 Q Were you successful in disposing of any of them?

22 A Yes.

23 Q How many did you dispose of?

24 A Thirteen.

25 Q What consideration was received for those thirteen



ELP Moskow - direct

36

coaches?

A \$22,000.

Q Where are the remaining thirty-six coaches at the present time?

A At our office in Emerson.

Q Are you at the present time ready, willing and able to deliver those to the defendant in fulfilment of the contract?

A That is correct.

MR. PHILLIPS: Your witness, counsel.

I would at this time -- and I am sure there would be no objection by the defendant, move to reduce the ad damnum from \$80,000 to \$58,000, in view of the extent of mitigation.

THE COURT: Very good. Is there any objection to that, sir?

MR. KOENIG: No.

THE COURT: All right; granted.

Mr. Phillips, before you do that, is there any selling expense that should be set off against that \$22,000?

MR. PHILLIPS: We would ask for interest, the profit on the contract from the date --

THE COURT: No. Is there any selling expense that should be set off against that \$22,000, of any substantial amount? If it is a small amount, then --

1 ELP Moskow - direct/cross

37

2 MR. PHILLIPS: I will ask.

3 BY MR. PHILLIPS: (Continuing)

4 Q Were there any expenses incurred in connection with  
5 the resale of the thirteen coaches?

6 A Yes; there were.

7 Q Do you have that amount available to you?

8 A Well, there is salesmen's commissions, consisting  
9 of fifteen per cent.

10 Q Can you ascertain those amounts, and we can furnish  
11 them to the Court later.

12 MR. PHILLIPS: I would ask leave to amend my motion  
13 to make it \$58,000 plus whatever expenses were incurred in  
14 connection with the resale.

15 THE COURT: There should be deducted from the re-  
16 duction whatever expenses were incurred in the sale, assuming  
17 the proof is appropriate.

18 Go ahead.

19 CROSS-EXAMINATION

20 BY MR. KOENIG:

21 Q Mr. Moskow, were you present when the contract  
22 which has been introduced in evidence was signed?

23 A When it was signed, no.

24 Q Prior to the signing of the contract, how long had  
25 there been a period of negotiations between the plaintiff and



ELP Moskow - cross

38

the defendant?

A Approximately four months.

Q Now, how many contracts had been prepared prior to the signing of the contract which is now in evidence?

A You mean copies which were not used? Three, four.

Q Who drew up the copies which were not used?

A We did. Silver Creations.

Q Who drew up the contract which is introduced in evidence in this proceeding?

A Silver Creations.

Q Where were they drawn up?

A You mean, where was the actual typing done?

Q Yes.

A In our office.

Q Where?

A Emerson.

Q I note in Paragraph 12 on Page 5 of the contract, as you drew it up, as it was drawn up by the plaintiff, there is a seventy-day period mentioned; is that right?

A That's correct.

Q And it is changed to sixty-five days to something written in and initialed?

A Yes.

Q Did you participate in any conversation which resulted

ELP Moskow - cross

39

in the change from seventy to sixty-five days?

A No; I did not.

Q Was there any statement made to you at any time why that change was in fact made?

A No; there was not.

Q Were you aware that the seventy-day period had been reduced to sixty-five days?

A Yes.

Q Did you have any conversation with Mrs. Stone or Mr. Stone as to why there was such a reduction?

A No; I did not, sir.

Q In the prior agreements, which were not signed, was there any specification of a time limit?

MR. PHILLIPS: I object to the form of the question. It is vague. The clause specifically sets forth the time limit for delivery.

THE COURT: Overruled.

Q In the prior agreements, was there any specification of the time limit for delivery?

A Yes; there was.

Q What was the period that was involved, if you know?

A They ranged anywhere from sixty days to ninety days.

Q Were you present when there were discussions about those sixty or ninety days?



1 ELP Moskow - cross

40

2 A Yes.

3 Q What was said about the time limit in the discussions  
4 which you had and with whom did you have them?

5 A She wanted them as soon as we could possibly get  
6 them made.

7 Q Was there any statement made by her that time was  
8 a consideration?

9 A She wanted them made as soon as she could get them.

10 Q I repeat my question: was there any statement made  
11 by her that time was a consideration?

12 THE COURT: I suppose that is his answer, Mr. Koenig.  
13 Mr. Moskow, the question: if you can answer it yes  
14 or no the way it is put, so be it. If you cannot, you need  
15 not accept it.

16 Do you want to have it read back?

17 THE WITNESS: Yes, sir.

18 (Question read.)

19 A Yes; there was.

20 Q When was it made, and by whom and to whom?

21 THE COURT: This was she, I assume.

22 MR. KOENIG: Well, I assume so.

23 THE COURT: You asked him, and he answered you  
24 yes, Mr. Koenig.

25 MR. KOENIG: His answer doesn't indicate to me who

ELP

Moskow - cross

41

made it.

THE COURT: You had asked him if she said that, and he said yes.

MR. KOENIG: I stand corrected, your Honor.

Q What was said?

A She said she wanted them as soon as possible.

Q For what purpose?

A She said she had them sold.

Q Did she indicate to whom they were sold?

A Yes. She started rattling off names: the Shah or Iran, Jackie Onassis, you know, assorted other people of the jet set. The names escape me now. But those are the type of people. But she did mention those in particular.

Q Did she mention any selling price to you?

A Five thousand dollars.

Q For each coach?

A Yes.

MR. PHILLIPS: May I approach the bench, your Honor?

THE COURT: We have no jury here, so --

MR. PHILLIPS: I want to go off the record.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: You have a telephone bill here for August?



JA55

1 ELP Moskow - cross

42

2 MR. PHILLIPS: Your Honor, I have an additional  
3 telephone bill, which indicates a telephone call to Longmont,  
4 Colorado. The telephone number is listed at 303-776-2992.

5 Does that refresh your recollection as to the place  
6 and the phone number?

7 THE WITNESS: I know the place. I wouldn't know the  
8 phone number.

9 MR. PHILLIPS: Do you have any other clients in  
10 Colorado?

11 THE WITNESS: What was the date of the call?

12 MR. PHILLIPS: This one was June 17th.

13 THE WITNESS: We do have other people in Colorado,  
14 and I don't believe that is the correct one.

15 MR. PHILLIPS: Let me withdraw it and keep going.

16 MR. KOENIG: If you can find it, we would be happy  
17 to have it.

18 MR. PHILLIPS: Let me withdraw that and keep going.

19 BY MR. KOENIG: (Continuing)

20 Q As you testified previously, the order for these  
21 coaches was placed with an organization in Tokyo, Japan.

22 A Yes, sir.

23 Q Do you know offhand when that order was placed?

24 A I do.

25 Q When?

JA56

1 EP Moskow - cross

43

2 A Approximately May 10th, within a week or two.

3 Q What year?

4 A 1974.

5 Q Was any delivery made to you by the organization in  
6 Tokyo, Japan, subsequently?

7 A Yes.

8 Q Pursuant to the order?

9 A Yes.

10 Q When?

11 A In the latter part of June.

12 Q Can you specify with any greater detail when it  
13 was received by you?

14 A Well, the last batch, as I said, was delivered July  
15 3rd.

16 Q How many batches were delivered?

17 A They come in three separate components: coach cab,  
18 coach chassis and the coachman's seat.

19 Q Can you at this time state the order in which they  
20 were delivered to you?

21 A I don't remember which box came first, no.

22 Q Did you inspect the box when it arrived at your  
23 plant?

24 A Yes.

25 Q Was it possible for you to organize the receipt of



- 1 ELP Moskoy - cross 44
- 2 the merchandise received from Japan without receiving it all?
- 3 MR. KOENIG: Withdrawn.
- 4 Q In other words, is it your testimony that you had
- 5 to wait until you got everything before you could put together
- 6 the coaches?
- 7 A No, but we did.
- 8 Q When for the first time did you start to put
- 9 together a coach?
- 10 A July 3rd.
- 11 Q For the purpose of putting together the coaches,
- 12 did you have an assembly line?
- 13 A There is no need for an assembly line.
- 14 Q Who did the work, the actual work?
- 15 A Two boys and myself.
- 16 Q How old are the boys?
- 17 A Twenty-four and twenty-one, I think, or something
- 18 like that.
- 19 Q Were you physically engaged in the work?
- 20 A Yes.
- 21 Q Together with these two boys, as you term them?
- 22 A Yes. Two young men.
- 23 Q How many coaches were you able to put together in
- 24 one day?
- 25 A The first day, as I said, we only put on together,

1 ELP Moskow - cross

45

2 because we got the delivery late.

3 Q Did you work on July 4th?

4 A No.

5 Q When was the next day that you worked?

6 A July 15th.

7 Q How many coaches did you put together then?

8 A Fifteen, because I was teaching them how to put them  
9 together.

10 Q How long did it take you to put together the five  
11 coaches on July 5th?

12 A Oh, about four or five hours. I put the first  
13 fifteen together myself.

14 Q The first fifteen?

15 A Yes.

16 Q You say you only put together fifteen --

17 A I said the first fifteen. I put them together my-  
18 self.

19 Q I am talking about July 5th.

20 A Yes.

21 Q You say you put together fifteen, and you did it  
22 all yourself?

23 A Yes. I was teaching them how to put them together.

24 Q Did you advise the manufacturer in Tokyo that  
25 there was a sixty-five-day deadline.



ELP

Moskow - cross

46

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A Yes.

Q Was that done by communication or verbal?

A Wait a minute. Let me re-answer that question.

I did not.

Q Who did?

A Mr. Freedman.

Q You didn't keep any records of any work that was done on these coaches, did you? Any written record?

A No.

Q The fact that you say you assembled these coaches is based upon your own personal knowledge?

A Yes. And the two other boys assembled them with me.

Q Are those two other boys still working for you?

A Yes; they are.

Q When you received the merchandise from Tokyo, have you any record to identify it as the merchandise which was ordered?

A That it was ordered -- what? The subject of the --

Q Yes.

A Yes.

Q Do you recall when you were examined being asked this question and giving this answer, at page 50:

"Q Is there any way for me to identify whether or not

ELP                      Moskow - cross

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that packing list specifically covers the coaches which are the subject matter of the contract and thus are the subject matter of this particular lawsuit?

"A    No."

A    Yes; I remember.

Q    Do you recall this question, on page 52:

"Q    Is there any indication on that document that the fifty pieces involved would be the same fifty which are the subject matter of this action?

"A    No."

A    Yes.

Q    On page 53:

"Q    Is there any indication on that document as to when you received that document?

"A    No. There is no indication as to when we received it. It just shows when it was executed.

"Q    What date would that be?

"A    July 1st.

"Q    July 1st?

"A    Yes.

"Q    When did you receive that document?

"A    I cannot answer that question.

"Q    Is it that you don't know?

"A    It comes in the mail."



ELP

Moskow - cross

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Do you recall those questions and answers?

A Sure.

Q At page 54:

"Q With respect to Defendant's Exhibit 6, is there any marking on there which would indicate the exact nature of the items that were shipped to you?

"A The answer is no. It says knocked-down parts. Coachman's seats, fifty pieces.

"Q There is no indication on there that it is the specific fifty that is the subject matter?

"A That is correct."

Do you recall those questions and answers?

A Absolutely.

Q You have had an opportunity to read your testimony given in the deposition?

A Yes.

Q And you have submitted an affidavit correcting some of the language in the deposition?

A Yes.

Q That was executed in New Jersey on April 6, 1975?

A Yes.

Q One of the answers which you corrected I will refer to. I will read the original answer and your correction. On page 40:

ELP

Moskow - cross

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"A We would have given them back their \$10,000 if we didn't notify them that they were ready or if they didn't come and pick them up in the sixty-five day period.

"Q Was it your intention that they were not to pay for these fifty coaches if they were not prepared within the sixty-five-day period?

"A That the contract would have been null and void.

"Q Null and void?

"A Yes."

Your correction --

MR. PHILLIPS: Your Honor, I have an objection. These are answers which obviously are legal conclusions, and the document speaks for itself.

THE COURT: Yes.

You are not a lawyer, I assume?

THE WITNESS: No.

THE COURT: I don't see that this has really an awful lot of bearing on the issue. The contract is what governs. Whether this gentleman had a particular view of it or not, I don't see that it has an awful lot of weight.

MR. KOENIG: May I conclude by pointing out the correction by the witness?

THE COURT: By all means.

Q In the affidavit, you say, page 40, lines 4 to 7,



ELP                      Moskow - cross

50

should read:

"We would have given them back their \$10,000 if we didn't notify them that they were ready or if they didn't have them ready to be picked up in the sixty-five-day period."

Do you recall that correction?

A     Yes. I think there was a word or two changed; that's all.

Q     Page 60:

"Q     Did you notify the Stones that they had arrived?

"A     They were not ready for them, no."

Do you recall that question and answer?

A     No.

Q     Referring to items for shipment, were there any other items required for the assemblage which did not come from Tokyo?

A     Yes.

Q     What were they?

A     The certificates of authenticity, the bases, the pillows, the Lucite covers, the placques -- those are the name placques. I think that's all.

Q     Where did they come from?

A     Locally. Locally around Emerson.

Q     Can you state when they were received by your corporation?

ELP

Moskow - cross

51

1  
2 A Yes.

3 Q When?

4 A Well, different dates. Which one do you want to  
5 know?

6 Q You can give me the dates and what was received.

7 A I have my records over there. Am I allowed to --

8 THE COURT: Mr. Koenig, is this highly relevant  
9 on your cross-examination?

10 MR. KOENIG: I don't know.

11 THE WITNESS: They are all before July 1st. I had  
12 most of everything, some in May, some in June.

13 Q In order to create the coach for inspection, what  
14 specifically had to be done?

15 A Put three things together.

16 Q Which three things?

17 A The coach chassis, the coach cab and the coachman's  
18 seat. Put them together.

19 Q What about these items that you received from local  
20 people in New Jersey?

21 A They were all ready. You know, just a completed  
22 package in its case, with the pillow, inspection for good  
23 delivery. That's all.

24 Q How many items, if you can recall, had to be used to  
25 put this together?



1       ELP                   Moskow - cross

52

2           A       Well, as you can see by the brochure, the case is  
3       a piece of wood -- I mean, the base, and the case just fits  
4       right on top of it. The pillow lays on top of the base.  
5       The placques were all put on the base, and the coach just  
6       sits right on top of the pillow. Takes about a minute.

7           Q       But this all had to be done at one time; is that  
8       right?

9           A       Just for inspection. She wanted them packed  
10      separately. She wanted everything packed separately for de-  
11      livery.

12          Q       When you testified that you put fifteen together,  
13      this all had to be done at that time?

14          A       No. The coaches get put together at a different --  
15      You assemble all the coaches, so you have fifth coaches all  
16      assembled, and then putting the whole composition together  
17      by putting a coach on the pillow on the base, with a top on  
18      it. That's what she wanted to see. Because everything had  
19      to be taken apart and repacked for her, because her specific  
20      instructions were that she wanted everything packed separate-  
21      ly, because when she shipped it, nothing would break, because  
22      she said she had no packing facility at her place. That's  
23      why we had to keep them at our place.

24          Q       Page 67; do you recall these questions and answers  
25      in your deposition?

ELP                      Moskow - cross

53

"Q    I want to know when they were started, and I want to know when they were finished. Tell me when they were finished.

"A    I don't know when they were started, because I don't know when the last piece came in that we could start working on them. But I would say that we had at least part of them, and I am not going to give you any figures, because I don't know how many parts of them were ready for her, and within the next day or two they were all ready.

"Q    When were they all ready?

"A    When?

"Q    Yes.

"A    I don't know.

"Q    What date were they all ready?

"A    I don't know. I will have to check that Monday or Tuesday."

Do you recall those questions and answers?

A    Yes. I will have to check that Monday or Tuesday was the date they were ready. I didn't know the date. I didn't have a calendar.

Q    Did you make those answers to those questions?

A    Yes.

MR. PHILLIPS: Counsel, would you please read the next question? I think it is a little unfair to take it



ELP Moskow - cross

54

completely out of context.

MR. KOENIG: I will continue if you want me to, to save you the trouble of rereading it so that the Judge may have the entire conversation.

"Q Of what?

"A After the July 4th week end, the 8th or 9th.

"Q Of July?

"A Yes.

"Q They would have all been ready?

"A Yes.

"Q The 8th or 9th of July?

"A Yes.

"Q At that time, did you have occasion to communicate with the Stones?

"A Yes."

Is that what you want?

MR. PHILLIPS: Thank you.

THE COURT: Shall we take our mid-morning recess?

(Recess.)

MR. KOENIG: Your Honor, some clarification of this Colorado number. As I understand it, we have now received a number at which -- to which we can make a call, and then it will be transferred to the mine. Is that it?

MR. PHILLIPS: Yes.

ELP

Moskow - cross

55

MR. KOENIG: It is not a direct number.

MR. PHILLIPS: I have furnished them the number which the plaintiff used to call her in Colorado. I trust its significance is not lost on the Court.

MR. MARROW: A few things there, if I may. They gave us two numbers. At the first number there was no answer. The second number, the office is checking on. I contacted the superintendent of the building in which they live, hoping that the superintendent would at least have a forwarding address, because she is there very infrequently. Most of the time, she is out of the city. He advises there is no forwarding address. He knows that Mr. Stone is out of the city at the present time and is expected back some time tonight or tomorrow morning.

This is at their home in New York. But there is no other way to contact them except these two numbers here.

THE COURT: Do I deduce that in your office you don't have such a number?

MR. MARROW: That's correct, your Honor. We have a New York number for them, and that's all, your Honor, which is logical in light of the fact that they live in New York, and at least one of them is available in New York City: the husband, and the wife is off in Colorado, running a silver mine.



1 ELP Moskow - cross

56

2 It may be stretching logic, but that is the way it  
3 is.

4 MR. PHILLIPS: I have nothing to add.

5 BY MR. KOWNING: (Continuing)

6 Q With reference to Plaintiff's Exhibit 2, is it your  
7 testimony that this was prepared some time before the contract  
8 was signed?

9 A Yes, sir.

10 Q I think you said some time in January or February?

11 A Yes.

12 Q Of 1974?

13 A Yes.

14 Q This was during the period of negotiations?

15 A Yes.

16 Q When did you receive payment for this Exhibit 2?

17 A In July.

18 Q That was the three thousand dollars which you  
19 testified to?

20 A Yes.

21 Q You say in July. When in July?

22 A July 9th.

23 Q Turning to page 57 of your deposition:

24 "Q From your experience, how many coaches do you feel  
25 a person can assemble on a given day?

ELP                      Moskow - cross/redirect

57

"A    Maybe eight or nine or ten.    It depends.

"Q    What does it depend on?

"A    Whether or not there are other interruptions.    I  
don't work on it full time.    It is not my kind of a job."

Do you recall those questions and answers?

"A    Yes.

MR. KOENIG:    I have no further questions.

REDIRECT EXAMINATION

BY MR. PHILLIPS:

Q    You testified that you received a payment for the  
brochures in July.

MR. PHILLIPS:    Mark this for identification, please.

(Plaintiff's Exhibit 7 marked for identification.)

Q    I show you Plaintiff's Exhibit 7 for identification  
and ask you if you can tell us what that is.

A    This is a photostatic copy of the check for the  
three thousand dollars for the brochures.

Q    Was that received by mail?

A    Yes; it was -- No; it wasn't.    I believe it was  
picked up.

MR. PHILLIPS:    I offer Plaintiff's Exhibit 7 into  
evidence.

MR. KOENIG:    I object to it.    It has no evidentiary  
value, the fact that they paid the three thousand dollars.



ELP

Moskow - redirect

58

MR. PHILLIPS: On the question of evidentiary value, your Honor, it is dated July 9th, which is three days after the supposed cancelation, and here is a payment being made in pursuance to a contract.

THE COURT: The objection is overruled. It may be received.

(Plaintiff's Exhibit 7 for identification was received in evidence.)

MR. PHILLIPS: That's all I have.

MR. KOENIG: No further questions.

(Witness excused.)

MR. PHILLIPS: Plaintiff rests.

THE COURT: I assume a motion will be made to dismiss on the ground that the plaintiff has failed to prove a prima facie case.

MR. KOENIG: No. It is not being made.

THE COURT: All right. There are cases that say that lawyers should not make it, but should wait until the end of the case. Then it is not being made.

What is your pleasure, Mr. Koenig?

MR. KOENIG: We are trying to get in touch with the stones. I will hopefully have Mr. Stone here tomorrow morning, at your Honor's direction.

THE COURT: All right. We will recess until tomorrow

ELP

59[a]

morning. At that point, you will either go forward with the Stones, use their depositions or the case will otherwise terminate.

MR. PHILLIPS: Thank you very much, your Honor.

(Adjourned to April 15, 1975, at 10:00 a.m.)

- - -



1 ELP

2 SILVER CREATIONS, LTD.,

3 Plaintiff,

4 vs.

74 Civil 3841

5 CLASSIC MASTERPIECES etc.,

6 Defendants

7  
8 New York, N. Y.

9 April 15, 1975 - 10:00 a.m.

10 (Trial resumed.)

11 THE COURT: Good morning.

12 MR. KOENIG: If your Honor please, I have not any  
13 witnesses present here, because of the circumstances which  
14 I will recount, and I should like to make two motions for the  
15 record.

16 I assume that in the event your Honor decides in  
17 favor of the plaintiff, there may be an appeal, and some sub-  
18 sequent lawyer will look over my shoulder and say, "This is  
19 what you should have done," which experience I have had in the  
20 past.

21 I think your Honor, as a trial lawyer, knows how  
22 that occurs.

23 MR. PHILLIPS: Wouldn't motions be previous to or  
24 in the absence of any judgment?

25 THE COURT: No. I will hear whatever you have to

1 ELP

2 say.

3 MR. KOENIG: I respectfully renew my motion for  
4 adjournment of the proceedings because of my inability to  
5 communicate with the defendant's witnesses. I have tried Mr.  
6 Stone's number as late as nine o'clock this morning, and  
7 Mr. Marrow can testify as to his efforts to reach Mrs. Stone  
8 in Colorado.

9 This is a non-jury case, and my original request  
10 was for a modest adjournment, until this Thursday. It has  
11 been stated to your Honor that Mr. Freedman, who, incidentally  
12 is not present this morning, who has not been called as a  
13 witness in this case in chief and may be called as a rebuttal  
14 witness, is leaving for Europe on Wednesday. In view of that,  
15 I submit that an inquiry should be made as to the duration  
16 of his trip.

17 I am willing to await his return and adjourn the  
18 case until such time. In order that your Honor may have a  
19 transcript of the testimony which has been testified to in  
20 this case, I shall order a copy of the minutes to be submitted  
21 to you.

22 I appreciate that in view of the fact that your  
23 Honor has many other matters, you do not desire to rely on  
24 your recollection, and the furnishing of the minutes will  
25 obviate any such circumstance.



1 MP  
2 That is my first motion.

3 I also respectfully move for a mistrial, for the  
4 following reasons:

5 One, on the basis of your Honor's rulings on my  
6 requests for adjournments.

7 Two, your Honor's acceptance of an uncorroborated  
8 letter of counsel which contained facts which could not be  
9 given in evidence in this proceeding, and your Honor's decision  
10 to anticipate the trial of this case without holding a confer-  
11 ence with defendant's counsel or in any way giving counsel an  
12 opportunity to be heard before the decision was rendered,  
13 anticipating the case.

14 I renew the application made in the motion papers,  
15 which requested your Honor to reassign the case and which  
16 was denied by your Honor.

17 THE COURT: Do you want to be heard?

18 MR. PHILLIPS: Yes, your Honor.

19 THE COURT: Please.

20 MR. PHILLIPS: I don't think that anything new has  
21 been added to what was discussed yesterday. All parties were  
22 aware that this was a firm trial date, without condition.  
23 The motion to disqualify the Court had no relation whatsoever  
24 to the trial date. There is nothing to indicate that had  
25 such motion been granted, another judge would not have tried

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the case on the same date.

Finally, there are depositions of both defendant witnesses in this case, which have been taken, and this Court of Appeals has held that where there is an opportunity to take depositions and the party has not available himself of them, he cannot complain if he fails to produce the parties.

I submit at this point I think it becomes obvious that while the requestion is certainly courteously and gently made, the request is solely for delay.

THE COURT: Mr. Koenig, what about that? Am I to credit the fact that no Stone has been unturned -- if I can capitalize the word "Stone" -- since last Thursday? This is now Tuesday morning.

MR. KOENIG: We have had no opportunity to -- we have made many efforts to get in communication with them, but we have been unable to do so. Mr. Marrow can testify as to what he has done since Thursday. My request for adjournment, your Honor, is a very modest one in a non-jury case.

THE COURT: It is not modest. We have a court schedule oigoing. Lawyers set their time. You worked all week end to be prepared for today. Your adversary, Mr. Phillips, worked. He had his witnesses here. He had his exhibits together.

You and I know -- and you have been at the trial bar



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2 much longer than I -- that a lawyer works up his case, and if  
3 it doesn't go on at the time when he has worked it up, he  
4 has to go work it up all over again, and he has to duplicate  
5 all of that work. You know that better than I do.

6 I am unable to understand, short of the Stones  
7 wishing to be unavailable, why between last Thursday and  
8 today, Tuesday, these people, who have a corporation that  
9 could make a contract that was running well into the six  
10 figures, and have a mine in Colorado that I take it is a  
11 producing one in terms of money, why nobody can get in touch  
12 with them.

13 I am astonished that nobody has called you to say,  
14 "Mr. Koenig, what happened to our case on Monday? Did you  
15 get an adjournment?"

16 The only conclusion I can come to is that they don't  
17 want to be around.

18 MR. KOENIG: I cannot agree with your Honor, because  
19 they have both been deposed --

20 THE COURT: Why don't you use your depositions?  
21 That is my next question.

22 MR. MARROW: Your Honor, can I offer something with  
23 respect to that?

24 The position of the plaintiff in this case is that  
25 there was a time-of-the-essence provision in the contract --

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THE COURT: You mean the defendants.

MR. MARROW: No. The plaintiff in their brief took this position: they conceded that there was a time-of-the-essence provision. However, they said that the sixty-five-day time-of-the-essence provision was waived. We went further in our response to that. We said if it was waived -- and we left that open as a question of fact -- we said if it was waived there are two issues that come to light. They are both factual questions.

The first question is whether or not the defendant did anything to reinstate time-of-the-essence. We cited the exact same case that was cited by the plaintiffs with respect to that proposition, because that seems to be the state of the law in New York, that it can be reinstated.

The second position we took was that the testimony offered yesterday from the deposition of Mr. Moskow establishes the fact that Mr. Moskow, speaking for the plaintiff corporation, in effect said that it had been waived on the sixty-fifth day of -- I am sorry -- the reinstatement had been waived by the plaintiff itself.

There are two factual questions there, and they are very serious ones, and I don't think that either of those factual questions are really dealt with in any depth in the depositions, and the only way we could explore those issues is



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2 to have the parties here.

3 Second, with respect to the counterclaims, there  
4 are two counterclaims here totaling \$61,000. At the time the  
5 deposition of the defendant was taken, the exploration that  
6 was taken by the attorney for the plaintiff was not really  
7 in great depth. They left the issue on that, and I think that  
8 it is fair to say if there was an opportunity for the defend-  
9 ants to be present, a great deal of credibility could be lent  
10 to these --

11 THE COURT: Let me ask you: the claim amounts to  
12 basically three things. One is the \$10,000; one is the \$3,000  
13 for the brochure, and the other is some \$48,000 for alleged  
14 loss of profit on resales.

15 MR. MARROW: That is correct, your Honor.

16 THE COURT: I assume that I have been accurately  
17 given the transcript of Mrs. Stone, whose deposition was  
18 that they had no orders for resale, that they had "strong  
19 interests". That does not rise to the dignity of an order.  
20 You know it and I know it, and this is the kind of a thing  
21 that as a matter of law doesn't get you an order, and, indeed,  
22 as a matter of fact, it sounds like somebody who is trying  
23 to come as close to an order as possible but can't really do  
24 it, and that is the way they phrase it.

25 MR. MARROW: With respect to that, I can only offer

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2 a conversation which I had with Mrs. Stone after the time  
3 the deposition was taken. She was confused. I think that  
4 that confusion could be cleared up at the time of the trial.  
5 We could bring it out. We could ask her to straighten out  
6 whatever confusion on her deposition testimony there was on  
7 her behalf.

8 THE COURT: Do you have a copy of your trial  
9 submission? I have one. I think it's in the back room.

10 MR. KOENIG: May I point out to your Honor that  
11 in a letter dated March 24, 1973, the original and copy of  
12 the transcript of the oral examination of the Stones was  
13 sent to our office, evidently received within a day or so  
14 later, and the letter states, "Kindly have the Stones review  
15 the transcript, make any appropriate corrections and return  
16 the original to me."

17 That has not been done.

18 MR. MARROW: Do you want a copy of the memorandum,  
19 your Honor?

20 THE COURT: I have it, thank you.

21 The first thing she said -- I am reading from page  
22 33 of her deposition -- 32 and 33 -- was that she said that  
23 during the period July 6th until the 26th, somewhere along in  
24 there, she said that she didn't want them because they were  
25 not going to be able to use them, since it was the summer,



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2 and the proper time, targeted time was to set to sell the  
3 coaches. That speaks in the future. Then she says at a  
4 later point -- no. Mr. Stone said:

5 "Q To your knowledge, had Classic Masterpieces ever  
6 received an order for one of those coaches?

7 "A To my knowledge, no."

8 Does that admit of any explanation, any qualifica-  
9 tion?

10 MR. MARROW: Your Honor, I believe that there was  
11 confusion at the time over what the term "order" meant. I  
12 believe that at the time of trial this could be cleared up.

13 THE COURT: Also, Mr. Stone:

14 "Q Did you tell the plaintiff that your company had  
15 acquired numerous orders?"

16 He said his attorney was told to do it.

17 "Q But no one had actually ordered one, in the sense  
18 that they had agreed to buy it?

19 "A No, and I was just getting strong interest."

20 Gentlemen, let's not play with words. I don't think  
21 Mr. Stone had any problem with understanding whether there  
22 was agreement to buy, an order.

23 MR. MARROW: Your Honor, in all respect, I think  
24 that the point is this, and this also came out in the deposi-  
25 tion. It came out in the deposition that the business arm of

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2 the defendant was Mrs. Stone and that the sales agent, so to  
3 speak, for the defendant, was Mr. Stone.

4 THE COURT: But Mrs. Stone said their selling period  
5 was to be in the period following the delivery.

6 MR. MARROW: That's correct. They were supposed to  
7 be delivered --

8 THE COURT: That is consistent with the fact that  
9 they had no orders.

10 MR. MARROW: The position of defendant was that they  
11 were to be delivered to these people in Morocco or wherever  
12 it was that the tournament was held and that they had people  
13 already aligned who wanted these particular items. What they  
14 had to do was to bring them there. That is why she insisted  
15 on having these within the sixty-five-day period.

16 In fact, there was a provision in the original con-  
17 tract which was brought out yesterday that had seventy days  
18 in it, and the seventy days was reduced to sixty-five because  
19 it was going to be very close to the time Mr. Stone was  
20 going to deliver these to the bridge tournament, wherever he  
21 was to take them.

22 THE COURT: I read that contract. I had the feel-  
23 ing that the word -- Where is the original? Do you have the  
24 original?

25 MR. PHILLIPS: I have it. It is not the original,



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2 but I have a copy --

3 THE COURT: Where is the one that was marked in  
4 evidence, the original contract?

5 MR. PHILLIPS: A copy is in evidence, Exhibit 1.

6 Your Honor, may I very briefly comment on some of  
7 the deposition.

8 First of all, the testimony at page 23 in the  
9 deposition of Mrs. Stone was that her husband wanted to,  
10 and I quote, "bring some replicas to Europe", not the entire  
11 fifty, and those, according to the testimony of the plaintiff,  
12 were ready on July 6th.

13 Secondly, on page 26 of Mrs. Stone's deposition,  
14 "As of July 6th, to your knowledge, had your company received  
15 any orders for the coaches?" Answer: "No."

16 I don't see how that can be explained.

17 THE COURT: This is her testimony?

18 MR. PHILLIPS: Mrs. Stone. This is unequivocal.

19 I submit the only reason there was a breach of  
20 contract was their own dismay and disappointment. They had  
21 no orders. The payment of the check July 9th, after the  
22 time of the alleged time-of-the-essence, is the best evidence  
23 that if there was a time-of-the-essence, there was a waiver,  
24 and that waiver has never been rescinded to this day.

25 MR. MARROW: To the first point, that the contract

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itself has a sixty-five-day provision in it, I think that any anticipation of the reason for the sixty-five-day provision in the context that was just spoken of here is actually irrelevant. The contract speaks for itself.

The second point as to the statement she made in the deposition: I think that already has been pointed out that there was confusion on her part that would be clarified at the time she was here.

The third point that was raised, the check itself, I think the check itself emphasizes the need for her to be here. The fact that the check itself is nothing more, I submit, of a declaration by her that they had in effect established the time-of-the-essence provision.

THE COURT: By making a payment after the time had expired?

MR. MARROW: That's right, because you can reinstate it, under the law, we submit.

What she in effect was going was paying the money and saying, "I want them now."

THE COURT: I know, but on the 9th they were all ready.

MR. MARROW: That is something we cannot bring a witness in here today for.

THE COURT: She cannot testify on that subject,



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2 because she was not in the plaintiff's place of business that  
3 day.

4 MR. MARROW: That's correct. We have a witness who  
5 was. We tried to get in touch with him all day yesterday  
6 and were unable to reach him because the phone didn't answer.  
7 We have someone who will be able to testify categorically  
8 that these were not ready until mid-August. This witness is  
9 a former employee of the company.

10 THE COURT: How long have you known about him?

11 MR. MARROW: We have known about this for many,  
12 many months.

13 THE COURT: Why wasn't he contacted starting last  
14 Thursday?

15 MR. MARROW: Because of the fact that we are all  
16 laboring under the assumption that when we got here yesterday  
17 -- I am sorry. As far as he is concerned, we did attempt  
18 to contact him, and we couldn't reach him. We couldn't reach  
19 anybody, your Honor.

20 I will be glad to represent to the Court that I was  
21 the one who was supposed to undertake reaching these people --

22 THE COURT: His telephone is out of order?

23 MR. MARROW: No. His telephone doesn't answer. I  
24 have memorized the telephone number. He lives in New Jersey.

25 THE COURT: Did somebody try to go to his home?

1 EOP  
2 MR. MARROW: No.

3 THE COURT: Did somebody send him a telegram?

4 MR. MARROW: No. I called him persistently. I tried  
5 all week end long.

6 THE COURT: Really, my patience is tried with this  
7 matter. I am going to give you an opportunity at this point  
8 if you want to read any part of the Stones' depositions for  
9 my consideration on the merits. I will give you that leave,  
10 and we will do it now. Do you want to give consideration to  
11 that for about two or three minutes?

12 MR. MARROW: Thank you very much, your Honor. Let  
13 us have an opportunity to discuss it.

14 (Recess.)

15 MR. KOENIG: If the Court please, I don't want to  
16 be placed in the position of waiving any rights which the  
17 defendant corporation may have. However, without any waiver,  
18 I am willing to submit in evidence the entire deposition of  
19 the Stones and have your Honor examine it and accept such  
20 statements in there which you think have any evidentiary  
21 value. There may be other statements you would want to ig-  
22 nore.

23 THE COURT: Mr. Phillips may have some objection  
24 as to parts of it as self serving.

25 MR. PHILLIPS: Your Honor, I would ask that they read



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2 the selected parts.

3 THE COURT: Definitely.

4 MR. KOENIG: It may take a considerable period of  
5 time to select the selected parts. That is the only problem  
6 I have. I would be perfectly willing to have your Honor --

7 THE COURT: No. How long will it take you to do  
8 that? A half hour?

9 MR. KOENIG: I would think so.

10 THE COURT: And then you will be ready to put in  
11 what you want, and Mr. Phillips can make objections as appro-  
12 priate?

13 MR. KOENIG: Yes.

14 THE COURT: All right. We will stand in recess  
15 until five minutes to eleven. If you finish earlier, I will  
16 be in the back room.

17 (Recess.)

18 THE COURT: Before we start the reading, I want to  
19 rule on Mr. Koenig's motions.

20 First, I am going to deny the request for an adjourn-  
21 ment. I want to state in one place and at one time that this  
22 trial date had been set somewhere in the third week of March.  
23 As I remember, I received a letter from plaintiff's counsel --  
24 and I will come to that in connection with the motion for  
25 mistrial that you made. When I received that letter, which

1 I regarded in the nature of an application for preference,  
2 really, given the circumstances brought to my attention having  
3 nothing to do with how any trier of the fact, particularly  
4 myself, would rule on the merits -- when I got that letter I  
5 endeavored to see if I could work in counsel on the morning of  
6 Good Friday or Passover, because of the representation to  
7 me that the case would take less than a day to try. That  
8 date was unsatisfactory, as I recall, for religious reasons,  
9 and therefore, in the third week of March I set April 14th,  
10 which was yesterday, for trial as a firm date.  
11

12 Following that time, we got the motion for me to  
13 recuse myself, which I regarded then, as I regard now, as  
14 wholly without merit. I am advised that my law clerks, in  
15 speaking to various parties, announced at that time that in  
16 the event that that motion was denied, the trial date of  
17 April 14th would stand.

18 It is acknowledged here as of yesterday that as of  
19 last Thursday, April 10th, everybody knew that the motion  
20 had been denied and that the trial date of April 14th was  
21 the date, and I have nevertheless, in order to make sure that  
22 defendant had ample opportunity to come in, given one extra  
23 day.

24 That is the end.

25 I will note this as against a history of difficulty



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2       and requisition the interposition of a magistrate to report  
3       with regard to getting the defendants to testify at their  
4       depositions.

5               A reasonable man could conclude that this non-  
6       appearance by the defendants here, putting the burden on  
7       counsel to try to get more time for them, is cut from the same  
8       piece of cloth. That application is therefore denied.

9               With regard to the motion for a mistrial, I regarded  
10      that, as I said when it was made, as without merit. Trial  
11      judges in this court and in all courts have the task in many  
12      a case of seeing if cases can be disposed of. They have pre-  
13      trial conferences, at which all kinds of things are said to  
14      them, and one of the jobs of a United States District Judge,  
15      indeed, if not all judges, is when sitting non-jury to put  
16      from his mind anything that has nothing to do with the merits  
17      of the case and, when trying the case on the merits, pay at-  
18      tention solely to the merits.

19              I have done that. I am doing that to the best of my  
20      ability. Anything having to do with the reason for granting  
21      this case a preference in no way enters into any conclusion I  
22      should reach on the merits of the case heard before me.  
23      This case will be decided solely on the evidence heard in  
24      this courtroom, presented by the parties.

25              Given that, also, Mr. Koenig remarked that the trial

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2       date had been set here without any opportunity to be heard on  
3       it. That just isn't so, because when the 29th of March,  
4       Passover or Good Friday was an inappropriate date for the  
5       parties, all the parties concurred at that time on April 14th.

6               So they were heard in the setting of yesterday as  
7       a trial date. So that motion is denied.

8               All right. Go ahead, Mr. Marrow. You can sit down  
9       and be a witness. I take it Mr. Koenig will be the examiner.

10              MR. KOENIG: I thought it would be much more appro-  
11       priate if Mr. Marrow would just read the questions and  
12       answers.

13              THE COURT: All right. Whatever you like. Go ahead.

14              MR. MARROW: I will read the page numbers so that  
15       you can follow, and also the line numbers.

16              Starting on page 9, line 25 --

17              MR. PHILLIPS: I think you should indicate prelimin-  
18       arily who is testifying.

19              MR. MARROW: You are right. This is from the  
20       testimony of Janice Gilbert Stone, given on February 28, 1975,  
21       at an examination before trial. Page 9, line 25:

22              "Q    When was your next business dealing with them?

23              "A    I believe it was in 1974.

24              "Q    What was the nature of the business dealing?

25              "A    A man who was then with the firm, an Edward



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2 Edward Faherty came to our apartment on an appointment, to  
3 tell us about some silver and gold plated coaches.

4 "Q Was that the beginning of the negotiation of a  
5 contract which is the subject of this lawsuit?"

6 No response.

7 "Q Is that the time you first started getting interested  
8 in the contract for the coaches?

9 "A It was the beginning of a discussion pertaining to  
10 the coaches. There was no mention of any contract."

11 Line 25, page 10.

12 "Q I believe you said, Mr. Faherty came to your  
13 apartment on early 1974."

14 Skipping down on page 11 to line 5 --

15 MR. PHILLIPS: Counsel, how can you read a question  
16 without reading the answer?

17 MR. MARROW: I am sorry. You are correct.

18 "A I didn't.

19 "Q When was it?

20 "A In 1974."

21 Skipping down to line 10 on page 11.

22 "Q What was discussed at that time?

23 "A He discussed a product called 'the Fischer coach'  
24 or 'the royal anniversary coach'. I don't remember what  
25 Silver Creations had made for Fischer body, and he discussed

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the fact that they were not all going to be taken by Fischer body, and that there would be a number authorized to be made separately in a different form, and he asked if we were interested in acquiring these coaches and calling them something else and selling them."

MR. PHILLIPS: Excuse me, your Honor. I respectfully object on the ground that this particular portion of the testimony that he is reading in goes to the preliminary discussions relating to the contract. The contract is in evidence and speaks for itself.

THE COURT: You are considering the parol evidence rule; is that it?

MR. PHILLIPS: Exactly. This is a two-year contract. It cannot be varied by testimony.

MR. MARROW: I think it has relevance to the counterclaims. It lays a foundation for the circumstances under which the counterclaim arises.

As to whether or not these coaches were something which were a very special item, they were going to be selling in Europe, which is our contention, and for which they were in the process of getting sales et cetera.

MR. PHILLIPS: We certainly will concede that these coaches were a very special item. Nothing beyond that. But the contract is in evidence, and any evidence as to the



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negotiations prior to the contract except on the question of Paragraph 12 I submit is totally irrelevant.

THE COURT: Do you contend otherwise?

MR. MARROW: I contend that it is relevant to the issue of the sales and the circumstances which took place and were taking place in Europe at the time.

THE COURT: How much reading does this entail? How many questions and answers?

MR. MARROW: I think I am finished.

THE COURT: Overruled.

MR. PHILLIPS: I am sorry. The last thing I have is page 11, line 20. Is that where you intended to finish?

MR. MARROW: Correct. Now, on what is known as page 13/14 for some reason, starting on line 12.

"Q Did there come a time when you became seriously interested in such a program?

"A Yes.

"Q What happened or what developed or what resulted or what development took place to lead them to becoming seriously interested in the program?

"A I suppose it was a combination of several things: one, the good salesmanship, the gentleman selling the item, and the other that we thought it was an attractive item if it could be made exclusively to us in a small number, that we

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2 would have the wherewithal and the people in our circle who  
3 would be anxious to buy them."

4 Page 15, dropping down to line 7.

5 "Q Had you made any investigation yourself at that  
6 time as to whether you would have a market for these coaches?

7 "A We had made preliminary efforts in discussing it  
8 with friends and the people that we knew to determine whether  
9 there would be any interest.

10 "Q You felt there was an interest?

11 "A We felt there would be an interest. I'd sent some  
12 letters and so forth.

13 "Q There came a time when an actual contract was  
14 discussed; did there not?

15 "A Yes.

16 "Q Could you explain to me how those discussions came  
17 about and what they consisted of?

18 "A They came about first with Ed Faherty, who was the  
19 representative of the Company, and later in a direct meeting  
20 with Mr. Friedman at our house, accompanied by Mr. Faherty,  
21 and later in the meeting out at Mr. Friedman's office. When  
22 my husband and I drove there. There was possibly one other  
23 meeting in our house when Mr. Friedman was up.

24 "Q Did you ask what the nature of the discussion was?

25 "A Yes. We were interested in acquiring the coaches



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1 if they could be modified and designed to be something ex-  
2 clusively to our Company, and also the nature of it was a  
3 time element was involved that we needed them in the summer  
4 of 1974 for us to be able to do anything with them, and the  
5 other was that they be restricted to certain exclusive areas  
6 that we would have and nobody else would be able to be inter-  
7 vening."  
8

9 Continuing on page 21, line 23.

10 "Q You will note on the third line of paragraph twelve,  
11 there is the number 70 typed in and crossed out and the number  
12 of 65 written above it, and the initials JGS. Are they your  
13 initials?

14 "A Yes, they are.

15 "Q What were the circumstances that led to that  
16 written change in the initialing?

17 "A We felt the period of 70 days was too long. We  
18 needed to have them in at least 65 days based on some subse-  
19 quent action that we planned."

20 Skipping down to line 14, on the same page.

21 "Q Who was present at the time of the signing?

22 "A Ed Faherty, myself and my husband."

23 Now, continuing on page 23, on line 3 there is a  
24 question.

25 "Q You mentioned that you felt that the 70 day period

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2 was too long in view of certain plans that you had. What  
3 were those plans?

4 "A My husband was to take a trip to Europe for a  
5 couple of tournaments that were to take place in the South of  
6 France and Greece, at which time he was to bring some replicas  
7 of the coaches with him and engage in the sale of those coaches  
8 to people that would attend the tournaments, some of whom he  
9 had already discussed that with.

10 "Q When was he to make that trip?

11 "A Before the middle of July. I am not certain of  
12 the exact date of the Monto Carlo tournament.

13 "Q Did he make that trip?

14 "A No; he did not."

15 Continuing on page 24, line 3; there is a question:

16 "Q At that time and immediately following the signing  
17 of this contract, were you or your husband making any trips  
18 in an endeavor to sell these coaches?

19 "A My husband and I each made a trip in May.

20 "Q Where was that trip to?

21 "A Los Palmos and Canary Islands."

22 On page 24, line 25, there is a question.

23 "Q What was your understanding to Silver Creations  
24 what to do as far as producing the coaches and making them  
25 available to you?



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"A There they would have to have the coaches manufactured according the modifications that had been discussed, and that they were to have them available for inspection by me prior to the end of that 65 day period or at least at the end of the 65 day period.

"Q Where was that inspection to take place?

"A At a place that was mutually convenient. It had been discussed that it would be out there, if that was convenient to me. When I say 'out there', I mean the Silver Creations property."

On the same page, page 25, line 20:

"Q Did there come a time when you were notified that the coaches were ready for inspection?

"A No.

"Q Were you ever notified that the coaches were ready for inspection?

"A I personally was not."

Continuing on page 26, line 1:

"Q Was anybody from your Company ever notified that the coaches were ready for inspection?

"A I believe my husband was notified at some much later date, but I think you'll have to ask him.

"Q When would the 65 day period have expired?

"A July 6th."

ELP

"Stone

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On page 26, line 17:

"Q As of July 6 or during the two to three week period thereafter, did you, yourself individually, have any contact with Silver Creations?

"A Yes.

"Q What was the nature of that contact?

"A I made a number of calls to Silver Creations asking them if the coaches were available for inspection.

"Q To whom did you speak?

"A I spoke to Rick Moscow, a secretary and, I believe, to Philip Friedman.

"Q When did these conversations take place?

"A Between July 6 and July 26."

On the same page, line 14:

"Q What was the substance of the conversations?

"A That the coaches were not ready for inspection, but that display cases were.

"Q Who told you that?

"A Any one of the number of people -- I believe Rick Moscow, Phil Friedman and Ed Faherty."

Continuing on Page 28, on line 4:

"Q When was your husband planning to go to Europe at that time?

"A For Monte Carlo on a tour toward July and a



ELP "Stone

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subsequent tournament in Greece.

"Q You said these conversations occurred between July 6 and July 26?

"A Yes.

"Q What happened after July 26?

"A I returned to Colorado.

"Q How long did you stay in Colorado?

"A Virtually until now with perhaps one or two trips back in between a day or two."

On page 29, line 4:

"Q What were the circumstances that led to that telephone conversation?

"A Well, I had spoken to my husband in New York who said they wished to speak to me at Silver Creations, Ltd. and he asked me to put in a call to them the next day, and I did put in a call to them and I believe I spoke to Mr. Moscow.

"Q What was the substance of the conversation?

"A The substance of the conversation was that Mr. Moscow thought we should take the coaches even though it was long past the time that it would do us any good.

"Q What did you say?

"A I said it was too late. I said we couldn't take the coaches unless I could be there to inspect them. I waited in New York several weeks to inspect them. At the time I was

E<sub>LP</sub>

"Stone

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speaking to them, it was impossible to leave our Colorado project and come back and inspect them. That was essentially the substance.

"Q Did you say to him about when you came back that you would inspect the coaches, that when you came back to New York you would inspect the coaches?

"A I don't believe so."

Continuing on page 31, line 3, there is a question:

"Q Did you have any knowledge of a telegram sent to Classic Masterpieces by Silver Creations, requesting that you pay for the coaches?

"A No.

"Q Have you ever seen such a telegram?

"A No."

On the same page, line 17:

"Q When you called the Silver Creations in July of 1974, am I correct in understanding that they told you all they had available were the cases for them?

"A My recollection is clearly there were no coaches at all available, that they had the cases and they might have some parts like some nuts and bolts, but no coaches or no main parts for assembly.

"Q At that point, did you tell them that you considered them to be in breach of the contract?



ELP

"Stone

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MR. PHILLIPS: Objection, your Honor. That calls for a legal conclusion.

THE COURT: No. I assume if it is communicated, it is a question of a statement.

Read the question again.

MR. MARROW: At that point, did you tell them that you considered them to be in breach of the contract?"

THE COURT: Overruled.

MR. MARROW: On line 9 of the same page, the witness answered:

"At that point, I told them it was very serious. We didn't have the coaches and then because time was of the essence, I did not discuss any legal questions such as the breaking of a contract, but I did say it was past the deadline, and I made a special trip back from Colorado to inspect the coaches, so my husband could take them with him on his trip to Europe.

"Q Did you tell them that you would not accept the coaches when they had them ready for you?

"A I did not tell them that on July 6, but as the time began to go along, during my three week or whatever it was, stay in New York, until the 26th, I certainly did indicate to them that since they had failed to come up with the coaches, that we would simply not be able to use them."

ELP "Stone

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Page 33, line 2:

"Q When you said you indicated that to them to whom did you say that?

"A I do not remember my exact words, of course, but the gist of the conversation was such that I clearly indicated to them that since that time had expired that we were not going to be able to use the coaches since it was the summer and that our proper time and target time was set to sell the coaches.

"Q What was your target time with respect to selling the coaches?

"A I believe I answered that.

"Q Just to go to the Monte Carlo tournaments?

"A The tournaments in Europe and other engagements in Europe that my husband would have, based on prior plans and conversations that he had with people and letters that I had sent, and during that summer he was to bring replicas of coaches and take some of the coaches with him and engage in selling them at that time.

"Q We are talking about the tournaments. What kind of tournaments are you talking about?

"A Backgammon tournaments, I believe, and bridge tournaments to which he was invited to represent America."

Continuing on page 34, line 14:



ELP

"Stone

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This is examination by myself, I believe.

"Q You testified before that on or about July 6, 1975 you did not have any orders, per se, and prior to the time you executed the contract in May. You also testified that you had been in communication with a number of people concerning these particular coaches?

"A That is correct.

"Q Were these the same people who your husband was going to see in Monte Carlo?

"A Some of them.

"Q Have these people expressed a firm interest in these?

"A Yes, they had.

"Q Did any of these people offer to you a firm commitment subject only to their seeing the coach?

"A It was more or less a general commitment. They were friends, so a firm commitment would have involved signing something. Nobody signed anything, but they were interested in based on our description of the coaches, and said they were looking forward to seeing them.

"Q Did you explain to Mr. Faherty or Mr. Moscow or Mr. Friedman the circumstances under which these coaches were to be displayed?

"A We had repeatedly explained that to them and repeatedly told them that time was of the essence and we had

ELP

"Stone

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to have the coaches by then. Otherwise, that whole summer, when this meeting with the people would occur, the most likely prospect for sale at that time would be passed, and if we didn't do it in the summer your chances would be greatly ruined --

"Q Did you explain that Mr. Stone was going to take these coaches with him to Europe?

"A Yes."

Continuing on page 36, line 9. The questions are now by plaintiff's counsel.

"Q Who are the people who indicated an interest in buying the coaches?

"A They were mostly Europeans.

"Q What are their names?

"A One of them was the Ambassador, the then Ambassador to Morocco to the United States and is now the Prime Minister.

"Q What is his name?

"A Arnold Osman. I sent a letter describing them to him."

Skiping down to line 22:

"Q Who else?

"A Another letter was sent to the Shah of Iran.

"Q Was any reply received?

"A I don't remember. I left New York shortly after



ELP

"Stone

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that. Others were people that were going to be at the back-gammon tournament that we had seen prior to the European tournament and a tournament in New York.

"Q These people have names?

"A Yes, one of them was the manager for Diana Ross, the singer."

Continuing on page 38/39. For some reason it is indicated that way. The questions again by Mr. Sovel. This is on line 14:

"Q With respect to paragraph twelve of the agreement, there is a provision, is there not, that the deposit would be returned if the coaches were not delivered within the 65 day period?

"A Yes.

"Q Was there any special reason why that language was put into the agreement?

"A Yes.

"Q What was the reason?

"A Because time was of the essence. If he was not able to get our coaches by that time, our chances of selling them would be diminished and we wanted to have the strongest stipulation as possible written into the contract."

Continuing on page 40, line 9:

"Q You were concerned to get your \$10,000.00 back if

ELP

"Stone

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you did not have the coaches back in the 65 day period?

"A Yes."

Continuing -- Before I say that, I am now reading from the examination of Tobias Stone, taken on the same day. This is page 44, line 17:

"Q Would you state, however, that most of the negotiations with Silver Creations people was conducted by your wife?

"A Fully accurate.

"Q After the contract was signed did you yourself make any effort to obtain any orders for the coaches?

"A To obtain orders?

"Q Yes.

"A I don't know how to answer that question. What I did was not to obtain orders but to evolve interest. Eventually, that would lead to orders. I didn't try to sell as such. I tried to evince interest.

"Q What did you do?

"A I talked about the coaches to people and sent letters out and made plans for a trip. When the coaches would arrive in the proper condition, I had to wait for that."

Continuing on page 46, line 25:

"Q Well, is it your testimony that you did not go to Europe because of the failure to have delivery of the coaches?



ELP

"Stone

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"A Yes."

Continuing on page 50:

"Q During the month of August 1974, did you have any contact with the people from Silver Creations?

"A They did make desperate attempts to reach me, but I would have nothing to do with them after what happened in July.

"Q What happened in July?

"A Well, what happened in July? As per the conversations per the agreement, with Silver Creations back when we made this whole agreement, my wife came back from Colorado and spent three weeks in New York, so that she could examine these coaches, and we could make our move, and she spent the entire three weeks in July while I was there canceling my plans because no coaches came and nothing happened, and getting me terribly upset, nothing happened in July."

That is the end. Thank you, your Honor.

THE COURT: Mr. Phillips, do you want to read any portions not read?

MR. PHILLIPS: Yes, your Honor.

THE COURT: Go ahead, sir.

MR. PHILLIPS: This is the deposition of the defendant by Janice Stone. Page 3, beginning at line 10. The examination is by Mr. Sovel.

1 ELP "Stone

2 "Q What is your name?

3 "A Janice Gilbert Stone.

4 "Q Where do you live?

5 "A 1045 5th Avenue.

6 "Q Mrs. Stone, are you employed or do you have any  
7 connection with Stone Films International, Corporation?

8 "A Yes.

9 "Q What is Stone Films International, Corporation?

10 "A It is a New York Corporation that originated,  
11 was involved in dealing with the film properties and then  
12 subsequently was involved in subsidiary activities.

13 "Q What is your position with the corporation?

14 "A Vice president.

15 "Q Who is the President?

16 "A My husband, Tobias Stone."

17 At page 5, line 23:

18 "Q Aside from those two companies, are there any other  
19 subsidiaries?

20 "A Yes."

21 I think there, when we use the term "subsidiaries",  
22 we can stipulate that we are talking of subsidiaries of  
23 Stone Films International.

24 MR. MARROW: Yes.

25 MR. PHILLIPS: Thank you.



1 ELP 'Stone

2 "Q What are they?

3 "A Classic Masterpieces."

4 Dropping to line 15:

5 "Q Who are the owners of Classic Masterpieces?

6 "A Tobias and Janice Stone."

7 Turning now to page 24, line 10:

8 "Q Following the signing of this contract, did you  
9 obtain any orders for coaches?

10 "A I did not obtain any orders.

11 "Q Did your husband obtain any orders, to your  
12 knowledge?

13 "A I believe you'll have to ask him.

14 "Q You don't know?

15 "A No."

16 Page 26, line 14:

17 "Q As of July 6, to your knowledge, had your Company  
18 received any orders for the coaches?

19 "A No."

20 Back up, now, to page 25, line 16:

21 "Q You did not contemplate that the 50 coaches would  
22 be delivered to your apartment on 5th Avenue?

23 "A Certainly not."

24 MR. MARROW: Your Honor, I object, because I don't  
25 know what relevance it has as to where the fifty coaches

ELP "Stone

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were to be ultimately delivered.

MR. PHILLIPS: I would be happy to discuss the question of relevance.

THE COURT: Overruled. I can appreciate this, given certain questions that read on that.

MR. PHILLIPS: Page 27, Line 6. This follows the testimony regarding the telephone conversations between the parties between July 6 and 26th.

"Q How many such conversations tookplace?

"A I have no idea.

"Q Were you in New York City at the time of those conversations?

"A Yes."

Page 28, line 16:

"Q Did you have any contact with the people in Silver Creations after you went to Colorado by telephone or otherwise?

"A I seem to remember one conversation with them from Colorado.

"Q When was that?

"A September.

"Q 1974?

"A Yes."

Page 36, line 29:



1 ELP "Stone

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2 This follows the question with regard to the  
3 Ambassador, the then Ambassador to Morocco and so forth:

4 "Q How many was he interested in?

5 "A I have no idea. He might have been interested in  
6 a large number."

7 MR. MARROW: Your Honor, I just point out, that is  
8 lines 19 and 20 and 21.

9 MR. PHILLIPS: Thank you. Page 40, line 16:

10 "Q Did you ever demand the return of your \$10,000.00?

11 "A I was back in Colorado, and I certainly had such  
12 discussions with my husband, and I would assume, he can speak  
13 for himself, he had such conversations with Silver Creations,  
14 Ltd., asking for the \$10,000.00 deposit back.

15 "Q You did not personally?

16 "A Demand it back, no, but in the conversations that  
17 I had with Mr. Moscow in September, it was certainly mooted.  
18 I certainly mentioned it and as I remember, I certainly must  
19 have expressed a desire to have it returned.

20 "Q That would be in September?

21 "A September, yes. I believe it was September. It  
22 could have been late August, but I believe it was in September."

23 Turning now to the testimony of Mr. Stone, page 47,  
24 line 5, after his testimony about canceling his trip because  
25 of the coaches, or alleged failure of delivery:

ELP "Stone

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"Q You were supposed to go on a tournament in Monte Carlo?

"A I was supposed to see people there that were going to appear in a tournament in July.

"Q Were you going to participate in the tournament?

"Q Yes.

"Q Was there a tournament in August that you were to go to?

"A You have to explain to me by what you are referring to.

"Q You said that there was a tournament in Monte Carlo?

"A In July.

"Q Any tournament after that you intended to go into?

"A Yes.

"Q Where?

"A Greece, Germany, and all over the Continent."

Turning to page 48, line 4:

"Q I am asking you: did you get an invitation?

"A I am automatically invited to all tournaments.

"Q Do you have to confirm your going to appear or not to appear?

"A No.

"Q Just have to show up the day of the tournament?



ELP

"Stone

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"A I don't show up the day of the tournament, a few days before.

"Q You have to make an entry form out for a tournament?

"A I just -- they see me there and that is it.

"Q What kind of a tournament?

"A Backgammon. Los Palms was bridge.

"Q Is it your testimony that the only reason you were planning to go abroad to these tournaments was in order to take the coach with you?

"A That was not my testimony whatsoever. I was beginning the trip of selling the coaches and playing backgammon tournament -- I said no such thing."

Page 51, line 5:

"Q Then in August," --

We can stipulate that the following "they" refers to the plaintiff.

MR. KOENIG: Yes.

MR. PHILLIPS: -- "they were making desperate attempted to contact you?

"A Desperate attempts and I wouldn't even pick up the phone. I had nothing to do with them."

Continuing on page 51, line 10:

"Q I show you a document which is marked Defendants exhibit number nine of the deposition of December 8, 1974,

1 ELP "Stone

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2 and I ask you if you recall receiving the original of the  
3 documents of which that is a photostat?

4 "A Do I remember receiving this?

5 "Q Yes.

6 "A Yes, I do remember receiving it.

7 "Q Was that after there had been a number of telephone  
8 calls" --

9 THE COURT: Mr. Phillips, could I see that? This  
10 is the wire --

11 MR. PHILLIPS: That is the telegram of August 29th.  
12 At page 52, line 6:

13 Q Has Classic Masterpieces, to your knowledge, ever  
14 received an order for one of these coaches?

15 "A To my knowledge, no."

16 That concludes the offer by the plaintiff of the  
17 defendant's deposition.

18 THE COURT: Mr. Doenig, do you have any further  
19 proof on behalf of the defendant?

20 MR. KOENIG: Not at this time, your Honor.

21 THE COURT: This is the time, so I take it the  
22 answer is that you do not have any further proof.

23 MR. KOENIG: I answered the question as well as I  
24 can.

25 THE COURT: Do you wish to adduce any rebuttal



1 ELP

2 testimony, Mr. Phillips?

3 MR. PHILLIPS: No, your Honor.

4 THE COURT: I take it both sides rest.

5 MR. KOENIG: I don't want to waive any rights which  
6 the defendant may have under the circumstances.

7 THE COURT: Whatever rights you have --

8 MR. MARROW: Your Honor, I would request permission  
9 to read in one more question.

10 THE COURT: Go ahead.

11 MR. MARROW: On page 53 of Tobias Stone's testimony.  
12 I believe it is myself asking the question. I am not sure.

13 "Q Had you acquired numerous orders for the resale of  
14 the coaches?

15 "A Prior to May 2?

16 "Q YES."

17 MR. PHILLIPS: That was not answered.

18 MR. MARROW: It continues on.

19 "Q Prior to May 2, 1974, had the defendant acquired  
20 numerous orders approval for the resale of the coaches at a  
21 minimum price of \$5,000?

22 "A I had advised my attorney who advised the plaintiff.  
23 I had advised them. We even said a strong interest."

24 That is all I have, your Honor.

25 MR. PHILLIPS: I must continue, then, with the next

ELP

"Stone

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question and answer, at line 14:

"Q But no one had actually ordered one in the sense that they had agreed to buy it?

"A No, when I was just getting strong interest."

That is all.

THE COURT: Mr. Koenig, I take it that, preserving whatever rights you have accrued to you by reason of motions made along the way, you rest at this point?

MR. KOENIG: Yes, your Honor.

THE COURT: And there is no rebuttal testimony?

MR. PHILLIPS: No rebuttal testimony.

THE COURT: Both sides move for judgment?

MR. KOENIG: I make the usual motion, under Rule 41(b).

MR. PHILLIPS: Plaintiff moves for judgment on all the evidence in the case.

THE COURT: Very well. We will take a recess of about ten minutes.

(Recess.)

THE COURT: Gentlemen, I make the following findings of fact:

There was a contract entered into between the plaintiff and the defendant on or about May 2nd of 1974. Under that contract, the plaintiff was paid the sum of \$10,000 as a down



1  
2 payment, that parts were ordered from Tokyo pursuant to that  
3 agreement by the plaintiff and were paid for; that brochures  
4 were printed in or about February 1974, after consultation  
5 between both parties, and payment was made for those bro-  
6 chures in the amount of \$3,000 on July 9, 1974.

7 I find further that a vast shipment of the coaches  
8 was delivered to the plaintiff for assembly on July 3rd  
9 and on July 6th, a Saturday, the sixty-fifth day under the  
10 agreement. Some of these coaches were ready for inspection.  
11 Mr. Moskow called Mrs. Stone of the defendant on July 3rd,  
12 asking her to come and inspect them and told her that the com-  
13 ponents had arrived, and he wanted her to come in, and she  
14 said she wanted to see them all at once and was preparing to  
15 go away.

16 I find further that on the 6th, Mr. Moskow and two  
17 colleagues continued to work; that on the 5th of July, fifteen  
18 had been ready; that on Monday, July 8th, which was after  
19 the Fourth of July week end, all of the coaches were ready;  
20 that the payment for the brochures under a check dated July  
21 9th was made from the defendant to the plaintiff; that Mr.  
22 Moskow tried to call the defendants on July 8th and got no  
23 answer, on July 9th got the maid, on July 10th spoke with Mrs.  
24 Stone, who said she was going away on a trip and that she  
25 would take care of it when she got back. Nothing was said in

1       ELP  
2       that conversation about any late delivery or demanding any  
3       \$10,000 back, as the contract would have provided, given the  
4       state of the calendar.

5               I further find that Mr. Moskow endeavored to speak  
6       with Mr. Stone later in July and into August, without success.  
7       At some point, he reached him and was told that Mr. Stone's  
8       wife, Jan, would take care of it. Mr. Stone did not demand  
9       the \$10,000 to be repaid in that conversation.

10              I thus find and conclude that the defendant did not  
11       consider time to be of the essence in this contract, and that  
12       was not a basis of refusal to take the merchandise, but, on  
13       the contrary, for one reason or another, I find that the  
14       defendant's ardor in desiring these articles to sell had  
15       cooled and that they therefore didn't want them.

16              After the lawsuit was instituted, in September, I  
17       find that plaintiffs sold thirteen of those coaches, for a  
18       total of \$11,000, against which was charged 15 per cent  
19       salesman's commissions, the balance of the coaches continuing  
20       to be at the office of the plaintiff and available for de-  
21       livery to the defendant.

22              I find that the defendant had no orders for any of  
23       these coaches at any time, let alone before July 6, 1974.  
24       I find specifically significant in reaching these conclusions  
25       that the defendant never asked for the \$10,000 back, up until



the time of the filing of the action, and that on July 9th, three days after the last day for delivery under the contract, payment was made for the brochures, which had been ordered in February.

Even if time were of the essence -- and I do not find it to be here -- since these brochures were printed in February and that there were four months of negotiating over this contract, even were time of the essence, I find that the plaintiff was ready to perform on July 8th, which was a Monday, the last day for performance being the prior Saturday, and I find that the defendants waived this right, in any event.

I may say in passing I place no weight whatsoever on Mr. Moskow's testimony as to the legal effect of this contract. That is a matter for the trier of the fact in this case.

As a consequence, I find that the plaintiff has met its burden of proof, and under CC Section 2-709, they are entitled to judgment in the sum of \$61,300, with interest since July 8th of 1974, that plaintiff is entitled to retain the \$10,000 down payment and retain the \$3,000 paid for the brochures.

The figure of \$61,300 is arrived at by deducting from the \$80,000 due on the contract the sum of \$22,000 that was received in mitigation, but subtracted from that is 15 per

cent salesman's commissions, in the amount of \$3,300, leaving \$18,700 in mitigated net to the plaintiff, which, deducted from \$80,000, leaves \$61,300.

As to the counterclaims, the proof having showed that the plaintiff was at all times ready to deliver in substantial accord with the contract, the first counterclaim is dismissed, and, for the same reason, the second counterclaim is dismissed, in addition, the trier of the facts having found that the defendant had no orders prior to July 6th.

That is an additional reason for dismissal of that counterclaim.

The foregoing is so ordered, and plaintiff may submit a judgment in accordance therewith on two days' notice.

MR. PHILLIPS: Thank you, your Honor.

THE COURT: Is your Honor ruling that plaintiff can keep the --

THE COURT: I am sorry. I neglected to state that.

Under UCC 2-709 -- I am glad you called that to my attention -- the plaintiff is to keep the goods pursuant to this contract available for the buyer to pick up at any time, in accordance with Section 2-709.

MR. PHILLIPS: Your Honor, may I ask that the judgment be amended to allow interest to be fixed at the rate of seven per cent.



ELP

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THE COURT: That is the current interest on judgments, according to the Civil Practice Act, is it not, at this point?

MR. PHILLIPS: Yes, your Honor.

THE COURT: Yes. That motion is granted.

All right, gentlemen.

- - -

WITNESS INDEX

| <u>Name</u>           | <u>Direct</u> | <u>Cross</u> | <u>Redirect</u> | <u>Recross</u> |
|-----------------------|---------------|--------------|-----------------|----------------|
| Richard Moskow        | 13            | 37           |                 |                |
| "Janice Gilbert Stone | 77            |              |                 |                |

EXHIBIT INDEX

| <u>Plaintiff</u> | <u>Identification</u> | <u>In Evidence</u> |
|------------------|-----------------------|--------------------|
| 1                | 14                    | 14                 |
| 2                | 16                    |                    |
| 3                | 19                    | 20                 |
| 4                | 19                    | 20                 |
| 5                | 25                    | 26                 |
| 6                | 28                    | 31                 |
|                  | 57                    | 58                 |



OPINION OF OWEN, D.J. (Filed June 4, 1975)

JAI23

NOTICE OF ENTRY

Please take notice that the within is a copy of a

by entered in the within named court on 19

at

Yours, etc.,

KOENIG, R. NER AND MOTT

Attorneys for

Office and Post Office Address

60 EAST 42ND STREET

New York, N.Y. 10017

To

Attorney for

NOTICE OF SETTLEMENT

Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named court,

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ENDORSEMENT - Silver Creations, Ltd. v. Classic Masterpieces  
74 Civ. 3841

Defendant Classic Masterpieces seeks a new trial of this action on the same grounds that it initially sought an adjournment of the trial namely, the alleged unavailability of Mr. and Mrs. Stone, the two officers of the defendant corporation.

During the trial I repeatedly denied defendant's motion for adjournment, fully setting out my reasons therefor (see Tr. pgs. 6-12, 74-77). I stand by those reasons. I particularly wish to note that plaintiff's counsel stated to me that Mr. Stone would return on the next day from a trip (Tr. p.13). The adjournment was granted in part on this statement by counsel, and viewed from hindsight this statement is inconsistent with the position Mr. Stone has taken in his affidavit in support of this motion.

I wish to further note however that Rule 59 of the Fed. R. Civ. P. permits the granting of a new trial "... (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the Courts of the United States." Professor Moore in his treatise on Federal Practice describes the scope of Rule 59 as follows:

Just as at law, a rehearing in equity and its present counterpart, a new trial in a court action, will not lie merely to relitigate old matter; nor will a new trial normally be granted to enable the movant to present his case under a different theory than he adopted at the former trial. As a practical matter, in equity formerly and in court actions now, three grounds for new trial are most commonly known: for manifest error of law or fact, and for newly discovered evidence.

Here defendant does not contend there was any manifest error of law or fact, or that it has newly discovered evidence. Rather, defendant's motion is predicated solely on the Court's refusal to grant an adjournment of the original trial date. In view of all of the above the motion is denied.

SO ORDERED:

United States District Court

May 30, 1975.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SILVER CREATIONS,

Appellee,

against

CLASSIC MASTERPIECES, etc.,

Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

James A. Steele

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at  
310 W. 146th St., New York, N. Y.That on the 23<sup>rd</sup> day of July 1975 at 346 West 17th St., N. Y., N. Y.deponent served the annexed Joint Appendix  
Abraham E. Freedman

upon

the Attorney in this action by delivering a true copy thereof to said individual  
personally. Deponent knew the person so served to be the person mentioned and described in said  
papers as the herein,Sworn to before me, this 23<sup>rd</sup>  
day of July 1975

Print name beneath signature.

JAMES A. STEELE

ROBERT T. BRIN  
NOTARY PUBLIC, State of New York  
No. 31-0418950  
Qualified in New York County  
Commission Expires March 30, 1977